Office of Command Counsel Newsletter

February 1998, Volume 98-1

Commercial Activities Workshop Plans Our Future

The AMC legal community played an important role in the first conference devoted to the critical issue of Commercial Activities, Privatization, Outsourcing, and Contracting Out.

Hosted by TECOM and sponsored by the AMC Deputy Chief of Staff for Engineers, the workshop was attended by 225 individuals from various AMC organizational elements, as well as HQ, DA, Army Audit Agency, TRADOC, Corps of Engineers and others.

Charles Foster, AMCEN, is to be commended for his work in bringing all the pieces of the workshop together. **Elizabeth Buchanan** and **Cassandra Johnson** made well-received presentations, and a paper written by **Linda Mills** significantly contributed to the program.

Enclosed is a copy of the Workshop agenda (Encl 1). Additionally, we provide a copy of **Cassandra Johnson's** outline "Labor Relations and Contracting Out — Reversing the Tide" (Encl 2) and **Linda Mills'** paper addressing the labor relations legal issues related to contracting out (Encl 3). **Fred Moreau**, OTJAG's Labor Advisor, gave a presentation entitled "Privatization and Outsourcing: Everything You Wanted to Know But Were Afraid to Ask". A copy of his briefing charts are available from **Cassandra Johnson**, DSN 767-8050.

There were two exceptional panel discussions, one comprised of General Accounting Office experts and another with a joint Congressional staff and business community focus.

Contracting out, privatization, outsourcing and the umbrella issue of commercial activities will continue to provide challenges throughout AMC and to the AMC legal community. It is important that AMC field and HQ counsel communicate and coordinate on all specific matters relating to the commercial activities area.

For more information on this important workshop contact **Cassandra Johnson**.

Seven Years Without An Itch

Welcome to the 7th--yes, the 7th year of the AMC Command Counsel Newsletter. We have kept to a bi-monthly publication schedule, making this issue our 37th. During this time our editor, **Steve Klatsky** has worked diligently to ensure that each edition contains information of both a substantive and personal nature. We are a closer legal community and family because of these tireless efforts.

In This Issue:

Untangling the Web

Allergic to dusty old books or suffer from claustrophobia when in crowded book stacks? Why not point and click to receive all sorts of great information to make you either a smarter lawyer, better conversationalist, or both?

On the Office of Command Counsel Home Page click on the Federal Web Locator, with links to all sorts of great sites. For example, OPM's Dealing With Workplace Violence: A Guide for Agency Planners, or the Library of Congress for an up-to-date list of all current legislation in both the House and Senate.

Many of our AMC attorneys have taken the time to bring various web sites to the attention of editor **Steve Klatsky**. These includes the following:

o Free weekly FEDweek newsletter available to any federal employee: www.fedweek.com. For example, the January 14 edition contained articles on the Thrift Savings Plan developments, free leave chart, defense panel on DoD contracting, DoD firefighter jobs, and Congress returning to session. Thanks to **Stan Citron**, HQ AMC.

o Acquisition attorneys may want to bookmark GeorgeWashington University's web site http://www.law.gwu.edu/burns.

Be sure to scroll down to "Government Contracts Resource Guide" for a complete list of useful on-line research links (e.g., various legislative, executive, and judicial branch links, as well as links to some on-line periodicals). **Patricia Tobin**, one of the three GW law librarians that created this guide, asks government contracts practitioners for feedback, as well as for links to other useful sites not listed in her guide. Ms. Tobin's e-mail address is ptobin@main.nlc.gwu.edu. Thanks to CBDCOM's **Lisa Simon**.

o TACOM's completely revised Public Homepage has several unique items such as listing AMC legal offices and a Legal Links legal research web directory: www.tacom.army.mil/legal/cctop.htm. Thanks to TACOM's **John Klecha.**

o Supreme Court business can be tracked through the Cornell University web site: http://supct.law.cornell.edu/supct. Thanks to HQ AMC's **LTC Paul Hoburg**.

o The Office of Personnel Management website is linked to the AMCCC Labor and Employment Law Team thanks to **Linda Mills**. http://www.opm.gov

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Letters to the Editor are accepted. Length must be no longer than 250 words. All submissions may be edited for clarity.

Acquisition Law Focus

Printing Business Cards with Gov't $---A Funding Issue (Of Course)

MAJ Cindy Mabry, HQ AMC, DSN 767-2301, has prepared a point paper providing information about the current rules for printing business cards, and possible future policy changes (Encl 4).

Army policy, as articulated in Army Regulation 25-30, prohibits printing business cards using appropriated funds. Following direction from the Joint Committee on Printing in Congress, and consistent with long standing Comptroller General opinions, the Army policy's only exceptions are business cards for military and ROTC recruiters, and contact cards for Army EOD units.

Recently, a Department of Justice (DOJ) Memorandum concluded that the purchase of business cards for agency employees who deal with outside organizations may be a proper expenditure from an agency's general appropriations.

The DOJ Memorandum noted that while Comptroller General opinions are useful, they are not binding upon agencies in the executive branch. Thus, pursuant to the DOJ Memorandum, agency needs may determine whether the use of such cards would carry out the purpose of an appropriation.

It must be remembered that the Army policy set forth in AR 25-30 currently remains in effect, and must be followed, until such time as the policy is changed, or unless exceptions are granted on a case by case basis. AMC is now in the process of requesting the expenditure of appropriated funds for printing business cards for official purposes. In the meantime, Army Standards of Conduct Office (SOCO) guidance on the use of Government computers to print business cards may be helpful. SOCO has stated that such use of government resources is acceptable, when authorized by the appropriate supervisor, if the employee provides his or her own card stock, and if the purpose of the cards is to enhance the employee's job performance.

We got Regs for you!

Army Regulation 5-20, Commercial Activities Program, is now final and in effect. It is being published and should be available shortly. Also, the 1998 DOD Authorization Act, Section 384, dropped the threshold for Congressional notification for most comparison studies to studies of more than 20 Full Time Equivalent (FTEs). The POC for this subject is either **Cassandra Johnson**, DSN 767-8050 or **Elizabeth Buchanan**, DSN 767-7572.

The Cost Comparability Handbook is being re-written after the Air Force C-5 maintenance competition. This Handbook is used for public-private competitions involving depot maintenance. The current and probably final draft permits demonstrated cost savings from better use of capacity to be a cost factor, and addresses cost of money and income tax impacts. As this area continues to grow in importance it should be a mandatory part of your library. The POC for this subject is **Ms. Elizabeth Buchanan**, DSN 767-7572.

Fighting Fraud: A Primer on *Qui Tam* Suits
Civil War Statute Saw the Future

CECOM Fraud Advisor **John Eckhardt**, DSN 992-9833, provides an excellent paper on Qui Tam suits — where a third party brings suit against a contractor (Encl 5). In a *Qui Tam* suit, an individual brings an action in federal District Court, on behalf of the *United States*. Since these suits are community brought alleging some sort of fraud, waste or abuse, they are commonly referred to as "whistleblower" suits.

Qui Tam suits are authorized by statute in certain cases, such as fraud against the United States. The *Qui Tam* action dates back to the Civil War era, when there was rampant fraud by businesses supplying war materials to the Federal Government. The existing Federal law enforcement and judicial structures were not equipped to address the magnitude of the fraud problem that the Government faced. In an attempt to deal with this problem, Congress authorized individuals to bring legal suits against people who had defrauded the Government.

Motivation to bring a Qui Tam suit covers all human emotions, such as a sense of civic duty, or a sense of indignation that the Government is being cheated. There are other, more tangible motivations for such a suit. First, such are often brought by a disgruntled contractor employee or former employee, who sees a *Qui Tam* suit as an avenue for airing grievances against the former employer. Such suits usually also include a suit for wrongful termination, unrelated to t he alleged fraud. The biggest reason, however, for bringing a *Qui Tam* suit is the potential for monetary award. Persons bringing such suits, called relators, are entitled to percentages (usually between 15 and 25 percent) of any damages recovered by the Government as a result of the suit, as well as their costs and attorney fees.

There are some limitations to bringing a *Qui Tam* action. Members of the Armed Forces are barred from bringing such suits based on facts or knowledge arising out of their official duties. Civilian Government employees, while not barred from bringing such suits, face a variety of procedural and circumstantial hurdles before they may be considered proper *Qui Tam* relators. *Qui Tam* suits may not be based on information publicly disclosed, *unless* the relator was the original source of the Government or public information. What constitutes "publicly disclosed" is a complex analysis, and generally includes most instances where the Government was already aware of the fraud.

Acquisition Law Focus

Contractors on the Battlefield:

Bridging Gaps in the Deployed Force Structure

On 12 December 1997, DA issued policy addressing many questions related to the role of contractors on the battlefield. In addition to firmly stating that contractors would generally be utilized above division but could be employed at lower echelons at the determination of the senior military commander, the policy memorandum also identifies a series of factors to be addressed during the negotiation and drafting of any contract which may place contractors in a deployed situation.

The policy memorandum is jointly signed by **Kenneth J. Oscar**, Acting Assistant Secretary of the Army (Research, Development, and Acquisition), and **Alma B. Moore**, Acting Assistant Secretary of the Army (Installation, Logistics and Environment). POC's are **LTC Paul Hoburg** at DSN 767-2252 and **MAJ Cindy Mabry** at DSN 767-2301.

Contractors are required to perform all tasks identified within the Statement of Work (SOW) and all other provisions defined within the contract. Contractors will comply with all applicable US and/or international laws. During a declared war, civilian contractors accompanying the US Army may be subject to the Uniform Code of Military Justice (UCMJ).

When US contractors are deployed from their home stations, in support of Army operation/weapon systems, the Army will provide or make available, on a reimbursable basis, force protection and support services commensurate with those provided to DOD civilian personnel to the extent authorized by law. These services may include but are not limited to non-routine medical/dental care; mess; quarters; special clothing; equipment; weapons or training mandated by the applicable commander; mail; and emergency notification. Planning must be accomplished to ensure agreed upon support to contractors is available to the responsible commander.

Among the factors that must be considered during the negotiating and drafting of any contract that requires the deployment of civilian contractors to support US Army operations/weapons systems:

- o Areas of deployment (to include potential hostile areas) and their associated risks.
- o Physical/Health limitations that may preclude contractor service in a theater of operations.
- o Contractor personnel reporting and accountability systems to include plans to address contractor personnel shortages due to injury, death, illness, or legal action.
- o Specific training or qualification(s) that will be required by civilian contractors to perform within a theater of operations, e.g., vehicle licensing, NBC, weapons.
- o A plan to transition mission accomplishment back to the government if the situation requires the removal of contractors.
- o When Status of Forces Agreement (SOFAs) do exist, they may not specifically address the status of contractor personnel. Contractor personnel stance will depend on the nature of the specific contingency operations and those applicable SOFA provisions.

Acquisition Law Focus

Certifying Officials Need to be Careful...Real Careful

Diane Travers, HQ, AMC, DSN 767-7571, provides a 10 December 1997 memorandum from AMCRDA, subject: AMC Policy in Support of the Rights and Responsibilities of IMPAC Certifying Official (Encl 6). Because of a recent change in law, certain officials who approve IMPAC card purchases must be designated as certifying officials. These officials may be held pecuniarily responsible for the costs of any purchases they certify for payment that may later be determined improper or illegal.

Pursuant to the provisions in DOD 7000-14-R, Vol 5, Chapter 2, paragraph 0212, a certifying official's liability is "strict and automatic," and they are assumed to be liable until they can prove otherwise - 31 USC Sec. 3527b. This means that these individuals are pecuniarily liable for the costs of any purchases they certify for payment which may later be determined improper or illegal. DoD Financial Management Regulation, Volume 5, Appendix C, paragraphs C104 indicates that certifying officials are insurers of the public funds in their custody and are excusable only for losses due to acts of God or the public enemy.

Certifying officials are, however, able to seek relief from Defense Finance and Accounting Service (DFAS), or the Comptroller General, per the same DoD Financial Regulation and law, so long as the payment is based on official records and the official could NOT have been reasonably expected to discover the correct information, or the payment was made in good faith, was not prohibited by law and the Government received value for the payment.

Certifying officials have the responsibility to know the policy concerning what is prohibited from IMPAC purchase and what is allowable for purchase. This includes but is not limited to Army Federal Acquisition Regulation Supplement 13-90, the General Services Administration Government wide Commercial Credit Card Service Contract Guide, the Standard Army Business Practices, HQ, DA and HQ, AMC developed policies and internal agency procedures. Ignorance of the policy is not an acceptable excuse for avoiding "pecuniary liability."

List of Enclosures

1. CA Wkshop Agenda
2. Labor Relations and Contracting Out
3. Labor Law Contracting Out issues
4. Printing Business Cards—A Funding Issue
5. Qui Tam Suits
6. Liability of Certifying Officials
7. Performance Specs and the Government Contractor Defense
8. JAG Visit Agenda
9. CSA—Consideration of Others
10. Defense Authorization Act
11. DA EEOCCRA LMR Policy
12. Is the H2o Safe?
13. Powering Down Utilities—ACSIM Policy
14. Guidance for Transferring Utility Ownership
15. Y2K or the Millenium Bug
16. Environmental EOs
17. ELD Bulletin Dec 1997
18. ELD Bulletin Jan 1998
19. General Wilson on Ethics
20. Ethics Advisory on Gifts and Travel
21. Travel Memo

Acquisition Law Focus

Performance Specs and the Government Contractor Defense

Sandy Biermann from IOC, DSN 793-7891, addresses an important question: Whether contractors bear an increased liability risk as we shift from manufacturing to design specifications to manufacturing to performance specifications. The not so surprising answer is probably: Some argue that by their very nature, performance specifications may threaten the availability of the so-called "Government Contractor Defense" to tort liability, thus leaving contractors more vulnerable to product liability suits.

Under the "Discretionary Function" exclusion to the Federal Tort Claims Act (FTCA), the federal Government cannot be sued for the negligent acts of government employees when those acts involve policy judgments and decisions in which there was a weighing of competing concerns. Ordinarily, this exclusion from liability would leave the contractor as the sole target of a lawsuit, but under certain conditions the "Government Contractor Defense" protects the contractor who shared in the Government's discretionary decision-making. In Boyle v. United Technologies the Supreme Court outlined the elements of the defense as follows: (1) the Government approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the Government about the dangers in the use of the equipment that were known to the supplier but not to the Government. (108 S.Ct. 2510, 1988.).

In order for a contractor to be shielded from liability for its negligence, the Government must exercise the discretion, not the contractor. In Trevino v. General Dynamics Corp., the court held that the defense "protects government contractors from liability for defective designs if discretion over the design feature in question was exercised by the government ... mere government acceptance of the contractor's work does not resuscitate the defense unless there is approval based on substantive review and evaluation of the contractor's choices." (865 F.2nd 1474, 5th Cir. 1989.). In Kleeman v. McDonnell Douglas Corp., the court noted that it is extensive government involvement in the design process which "provides tangible evidence of the strong federal interest which justifies the creation of a federal common law defense for government contractors in the first place." (890 F.2d 698 (4th Cir. 1989.).

Whether deleting design specifications effectively eliminates the Boyle defense is a controversial issue not yet fully addressed by the courts. Experts differ on the potential liability increase. Pentagon acquisition reform chief **Colleen Preston** didn't believe this issue would have a substantial impact. (See: "Is a Risky Business Getting Riskier?", Defense Week, May 15, 1995.). She argued that in most cases companies were liable and Boyle didn't apply;

An inherent factor in the shift to performance specifications is that contractors may be more vulnerable to product liability claims; that may well be one of the factors driving the change. This article contains a debate between Ms. Preston and contractor counsel that frames the issue and impact (Encl 7)

Employment Law Focus

CSA on Considering Others

AMC Chief of Staff **James Link** provided HQ AMC employees with a recent statement from General **Dennis J. Reimer**, concerning the results of the Secretary of the Army Senior Review Panel, one of the most comprehensive studies ever done on the human relations climate in the Army (Encl 9)

One of the developments is a Consideration of Others Handbook. MG Link states that the essence of this program is for you to assess and improve the organizational climate of your command, both your military and civilian work force.

The handbook has sections on the concept of operation, several specific focus areas and lesson plans. The Equal Employment Opportunity Advisor is key to the successful implementation of the Consideration of Others program. A videotape has been produced, and training will be executed by the DoD Equal Opportunity Management Institute.

The handbook can be viewed in the DA DCSPER Home Page: www.odcsper.army.mil

Firm Choice Still Around

Agency practitioners breathed a sigh of relief two years ago when it appeared that the MSPB and the EEOC were both now in agreement that the law did not require "firm choice" between rehabilitation and discipline. You were cautioned that agencies could voluntarily provide for "firm choice" in its agency regulations.

In Humphrey v. Department of the Army, 97 FMSR 5417 (Sept 26, 1997), the MSPB determined that the Army failed to act in accordance with its own regulations on the treatment of alcoholism. Under provisions in AR 600-85, the DA adopted the view that it would accommodate an employee's disability by holding discipline in abeyance while providing the appellant 90 days to seek rehabilitation, and to forbear from imposing the suspension if the appellant should demonstrate success.

The obvious practical point is that the issue of "firm choice" is subject to case law and specific agency regulations.

Rights Act Damages Covers Entire Claim

The U.S. Court of Appeals for the Sixth Circuit has ruled that the $300,000 damage cap under the Civil Rights Act of 1991 applies to an entire claim filed under Title VII, rather than to every separate claim of discrimination, Hudson v. Reno, No. 96-5232, Dec. 4, 1997.

The court stated that the plain language of Section 1981a applies to "an action brought by a complaining party" and that $300,000 is the maximum that may be recovered by "each complaining party" against a "respondent that has engaged in unlawful intentional discrimination." It rejected plaintiffs' argument that under the damages provision of the Act, she is entitled to recover up to $300,000 on each of her separate Title VII claims of sex discrimination, retaliation, and constructive discharge. The Court ruled that the "Friend of the Court" brief filed by the Equal Employment Opportunity Commission was entitled to no deference when it was clearly at odds with the statute.

Employment Law Focus

High Court Finds *No* Right to Lie

In a long-awaited ruling the U.S. Supreme Court ruled unanimously that federal workers who deny a job-related misconduct charge can be separately charged and disciplined for lying.

In Lachance, Acting Director, OPM v. Erickson, No. 96-1395, January 21, 1998, the Court held that neither the fifth amendment's due process clause nor the Civil Service Reform Act, 5 USC Sec 1101 et seq, precludes a federal agency from disciplining an employee for lying during an agency investigation.

Erickson, a police officer with the Bureau of Engraving and Printing, was investigated as part of an agency effort to discuss who was making harassing telephone calls. Erickson denied any and all knowledge. It was eventually discovered that Erickson had encouraged others to make these calls. The Bureau fired Erickson for his part in the incident and for lying about it.

On appeal, the Merit Systems Protection Board and the Federal Circuit both ruled that the false denial could not be considered in setting an appropriate penalty. The Supreme Court rejected, on both precedent and principle, the Federal Circuit's view that a "meaningful opportunity to be heard "includes a right to make false statement with respect to the charged misconduct:

It is well established that a criminal defendant's right to testify does not include the right to commit perjury, e.g., Nix v. Whiteside, 475 U.S. 157, 173, and that punishment may constitutionally be imposed, e.g., U.S. v. Wong, 431 U.S. 174, 178, or enhanced, e.g., U.S. v. Dunnigan, 507 U.S. 87, 97, because of perjury or the filing of a false affidavit required by statute, e.g., Dennis v. U.S., 384 U.S. 855. The fact that respondents were not under oath is irrelevant, since they were not charged with perjury, but with making false statements during an agency investigation, a charge that does not require sworn statements. If answering an agency's investigatory question could expose an employee to a criminal prosecution, he may exercise his Fifth Amendment right to remain silent. See, e.g., Hale v. Henkel, 201 U.S. 43, 67. An agency, in ascertaining the truth or falsity of the charge might take that failure to respond into consideration, see Baxter v. Palmigiano, 425 U.S. 308, 318, but there is nothing inherently irrational about such an investigative posture, see Konigsberg v. State Bar of Cal., 366 U.S. 36, Pp. 2-5.

Where We Retire

The National Association of Retired Federal Employees reports that Federal employees retire to many interesting places outside the US For example, in October 1997 annuity checks were mailed to

Ukraine	3
Peru	68
Romania	13
Serbia	133
Poland	92
Canada	1,956
Hungary	27
Mexico	377
Israel	200
Japan	975
Australia	188
India	816
Greenland	60
France	187
Gemany	1,387
Hong Kong	77

And, one each in Vietnam, Qatar,Albania, Eritrea, Argentina, Senegal and Guinea-Bissau.

Happy Retirement.

Employment Law Focus

Defense Authorization Act on Personnel, Depot Mgmt & Acquisition Issues

The Defense Authorization Act for FY 1998 addresses many important civilian personnel issues. Perhaps the most critical is Section 357, which amends 10 USC 2466(a), increasing from 40% to 50% the share of depot level maintenance and repair workload that may be performed by the private sector.

The legislation also prohibits the management of depot-level maintenance and repair employees by any demonstration of man years, end strength, full-time equivalent positions, or maximum number of employees (Section 360).

The Secretary of Defense is required to designate each depot-level activity as a Center of Industrial and Technical Excellence in the core competency of the activity; requires reengineering of industrial processes; adopts a best-business practice requirement at depot activities in connection with core competency requirements; and, allows Centers to enter public-private relationships.

The statute at Section 591 contains an important sexual harassment provision. It amends Title 10 to add section 1561. 10 U.S.C. section 1561 obligates commanders to take certain actions upon receipt of a complaint from a member of the command or a civilian employee under the commander's supervision that alleges sexual harassment by a member of the armed forces or a DoD *civilian employee.* 10 U.S.C. section 1561 includes a definition of sexual harassment similar (<u>but not identical</u>) to the definition in DODD 1350.2 and AR 600-20. This new statutory definition is broader than the Title VII definition of sexual harassment. It covers condemnation by persons in supervisory positions and deliberates or repeated unwelcome gestures or comments of a sexual nature in the workplace by any member of the armed forces or DoD civilian employee, whether or not such activity creates a hostile work environment or adversely affects the victim's ability to perform his or her job.

Section 911 amends Title 10 to add section 130a. 10 U.S.C. section 130a requires a 25 percent reduction in the number of personnel assigned to management headquarters and headquarters support activities phased in over 5 years.

Section 912 requires a reduction of 25,000 in the number of defense acquisition positions in FY 1998. The Secretary of Defense is authorized to waive up to 15,000 of that number if the Secretary determines and certifies to Congress that a greater reduction would be inconsistent with cost-effective management and would adversely affect military readiness.

Encl 10 contains an in-depth summary of these and other provisions.

More on the Defense Authorization and Appropriations Acts in later Newsletter editions.

Employment Law Focus

OPM to Issue LMR Advisories

To provide labor-management relations specialists with information about Federal labor-management relations, OPM will be issuing, on a nonscheduled basis, Labor-Management Relations advisories that are designed to convey information in a more timely and flexible manner.

After announcing this system, OPM issued its first advisory, the subject of which is the labor-management relations implementations of OPM's revised reduction in force regulations, Labor-Management Relations Advisory #97-2, Dec. 4, 1997

This advisory discusses new options available for adding service credit for particular performance ratings, and advises readers on the current requirements regarding possible conflicts between existing collective bargaining agreement provisions and a new government-wide regulation.

DA EEOCCRA Issues EEO-Labor Relations Policy

Covers Official Time & Union Rep Standards

Stanley L. Kelley, Jr., Director, Equal Employment Opportunity Compliance and Complaints Review Agency (EEOCCRA) issued an important policy statement to all DA EEO Officers, stating that union officials or members may be designated as a complainant's representative.

The policy encourages consultation with legal and CPO to determine when such representation would be a conflict of interest with the official or collateral union duties of such designated representative. For example, a Union president may not represent a supervisor if he/she supervises a person who encumbers a position in the bargaining unit. In this circumstance the Union president may be disqualified due to conflict of interest. This important policy also addresses other issues:

o Time used by a union official or union member in representation of the complainant in administrative EEO complaint process cited in 29 CFR Part 1614 is not to be considered nor computed as "official time" within the confines of "official time" as stated in 5 USC Section 7131 unless a negotiated labor-management agreement includes EEO representation as official time under section 7131.

o While on duty and otherwise in a pay status, a reasonable amount of official time, as defined in EEOC's EEO Management Directive 110, is permitted by a management official. The actual number of hours to which complainant and his/her representative are entitled will vary, depending on the nature and complexity of the complaint and considering the agency's mission and the agency's need to have its employees available to perform their normal duties on a regular basis.

o No award of attorney's fees is allowable for the services of any employee of the federal government.

Enclosure 11 contains the EEOCCRA edict.

Environmental Law Focus

Can your drinking H2O pass the test?

The Safe Drinking Water Act Amendments of 1996, made substantial changes to the basic Safe Drinking Water Act, including expanding the waiver of sovereign immunity. Under section 1447 of the Act, as amended, 42 U.S.C. 300j-6, federal facilities are now subject to enforcement actions by EPA, state and local authorities, and sanctions including penalties. One of our installations is currently responding to an EPA enforcement action and proposed $600K penalty for alleged SDWA violation. Environmental Law specialists need to reaffirm to installation personnel the need to comply with federal and state safe drinking water requirements. Guidance on the changes made by the 1996 Amendments is provided in Enclosure 12.

Medical Wastes--Handle Correctly

The Medical Waste Tracking Act of 1988 (MWTA), established a two-year EPA administered demonstration program in certain coastal states to improve the proper management of medical wastes. It contained a very expansive waiver of sovereign immunity, 42 U.S.C. 6992e(a). While it could be argued that this expansive waiver is no longer valid upon expiration of the demonstration program, in many states the management of medical wastes is part of the state's solid waste management requirements and thus subject to potential state and local penalties pursuant to the general waiver in the Solid Waste Disposal Act, 42 USC 6961. A local jurisdiction recently attempted to impose a $5000 penalty against a post Hospital for violation of local medical waste regulations. Hospital and medical personnel should be reminded to comply with any local regulations for the proper management of medical wastes. More information and a copy of an article, State Regulation of Military Medical Waste-Has Sovereign Immunity Been Waived? can be obtained by contacting **Bob Lingo,** DSN 767-8082**.**

Powering Down: Getting Out of the Utility Business

As a result of the Defense Reform Initiative, the Assistant Chief of Staff for Installation Management has directed that by 1 January 2000 installations privatize all utility systems (electric, water, wastewater, and natural gas) except those needed for unique security reasons or when privatization is uneconomical. Privatization of utility services at active installations involves acquisition, environmental, and real estate issues. AMC attorneys must be involved in developing the required implementation plans to meet the 2000 goal. The ACSIM policy and procedures for privatization of utility systems is at Encl 13, and real estate guidance for transferring ownership at Encl 14. Both documents and current guidance on outsourcing and privatization, including utility privatization, can be obtained from the ACSIM Home Page, http://www.hqda.army.mil/acsimweb.

Environmental Law Focus

The President Speaks Again-- Environmentally Related EOs

The December 1997 edition of the Newsletter contained a list of some of the more recent or well-known environmental Executive Orders. Our legal office at CBDCOM has expanded the list, and provided a summary of each executive order or directive, Enclosure 16. Thanks! Your products will be useful to all!

Letting Others Use Our Facilities

With decreasing mission activities and tight budgets, it is crucial that the Army lease vacant or underutilized facilities to non-Army entities, to lower maintenance costs and maintain the facilities in good condition. However, proposed leasing actions must comply with the National Environmental Policy Act (NEPA) and meet other environmental requirements. The Industrial Operations Command and our legal office have compiled a guidance document to assist in writing and reviewing an Environmental Assessment for these real estate actions. If you would like a copy contact **Bob Lingo** or **Stan Citron.** In addition to NEPA compliance, Army policy in most cases requires a Finding of Suitability to Lease and an Environmental Baseline Survey, per AR 200-1.

Contracting for Environmental Remediation

Can we lower costs and achieve greater efficiency by contracting for environmental remediation? The issues and problems raised by this approach are addressed in a paper prepared for The Judge Advocate General's School 1997 Contract Law Symposium, entitled *Some Issues Regarding "Privatization" of Environmental Remediation Work at Federal Government Facilities*, by Charles R. Marvin, Jr. A copy may be obtained from the JAG School, or by contacting **Bob Lingo, DSN 767-8082.** More information on this program, and the Department of Energy's overall privatization effort is located on the DOE Privatization Homepage, http://www.doe.gov/privatization/report/.

ELD Bulletins for Dec '97 & Jan '98

Environmental Law Division Bulletins for December 1997 and January 1998 are provided (Enclosures 17 and 18) for those who have not yet signed up for or do not have access to the LAAWS Environmental Forum or have not received an electronic version.

New JAG Team Visits AMCCC

On 14 January 1998, the Office of Command Counsel had the pleasure of hosting **MG John Altenburg**, The Assistant Judge Advocate General, **BG Michael Marchand**, Assistant Judge Advocate General for Civil Law and Litigation, **Robert Kittel**, Chief, Regulatory Law Office, **COL Richard Rosen**, Chief, Personnel Plans and Training Office, and **LTC Janet Charvat**, Office of The Judge Advocate General.

In addition to a courtesy call with Chief of Staff **MG James Link**, **Ed Korte** chaired a series of briefings by **Nick Femino**, **Colonel Bill Adams**, **Bob Lingo**, **Stan Citron**, **Steve Klatsky**, **Elizabeth Buchanan**, **Diane Travers**, **LTC Paul Hoburg**, **MAJ Cindy Mabry**, **Craig Hodge** and **Bill Medsger**. A copy of the complete agenda is enclosed (Encl 8).

AMC attorneys and JAGC Counsel enjoy an excellent relationship, an acceptance of joint objectives, and a recognition that mutual support contributes to the success of each organization.

We look forward to working with the new JAG team under the leadership of **MG Walter B. Huffman**, The Judge Advocate General.

The Y2K Problem or the Millenium Bug

AMCOM's **Dalford R. Widner**, DSN 788-0532, provides an interesting and very readable article on a subject that we have all heard about: what happens to our computers on 1 January 2000 (Encl 15). Some dramatic statistics or at least estimates of the magnitude of the problem:

o Repair costs exceeding $2,000 for every working person in the US

o OMB estimates $3.8 billion to fix the problem.

o American Bar Association projects cost of business disruptions and legal costs could reach a trillion dollars.

And....

The "imbedded chip" problem caused, so says the Government Computer News, the DoD Global Command and Control System to crash during a Joint Warrior Interoperability Demonstration.

The General Accounting Office released a report (GAO T-AIMD-97-129) titled "Time is Running Out for Federal Agencies to Prepare for the New Millennium." The report outlines a five phase OMB strategy of best practices for addressing the Y2K problem.

All the information in this fascinating article was downloaded from the Internet. For example, the Army Year 2000 homepage at http://imabbs.army.mil/army-y2k.

Dal ends his article on a happy note: "As for me, I'm not worried. After all on 28 December 1999 I will be 60 years old, having been born in 1939. On 1 Jan 2000 I will be only 39 (00-39=39) and since my computer tells me it is a Monday, I will be especially happy that it is a holiday and I don't have to work."

Ethics Focus

Chain, Chain, Chain or We Get Lots and Lots of Letters

We know that it is a misuse of Government resources for an employee to use his or her Government computer, LAN and Internet access to send electronic chain letters. But what about unsolicited chain letters that an employee might receive on his or her Government computer?

Recently, an employee in HQ, AMC received a chain letter via e-mail addressed to his AMC e-mail account on his Government computer. It did not originate from any USAMC or other Government computer. Like most chain letters, it promised riches ($55,000 to be exact) for a modest investment of time and money ($20). It was thinly cloaked as a multi-level marketing scheme involving the sale of various financial reports. But our AMC employee did not jump at this opportunity and decided to keep his $20.

But he was understandably irate at receiving it here, on the job, on his Army computer. In his frustration, he e-mailed the Command Counsel's office and asked if this wasn't illegal, and couldn't we help him.

Although we were not able to satisfy the employee with summary execution and disposal of the offending source of the electronic chain letter, here is what we advised him. This might help you deal with a similar problem if it arises within your organization. The fact of the matter is that there is not a lot that we can do about unsolicited "spam" from outside the Government, whether it comes by snail mail or electronic mail.

Ethics Counselor **Mike Wentink**, DSN 767-8003, concluded that there is not much that can be done other than hit the delete button, especially since the sender was not an AMC employee. The USPS webpage does contain some advice to some recipients of chain letters. Check out http://www.usps.gov/websites/depart/inspect/chainlet.htm

The last paragraph of the USPS webpage on chain letters says: "Turn over any chain letter you receive that asks for money or other items of value to your local postmaster or nearest Postal Inspector. Write on the mailing envelope of the letter or in a separate transmittal letter, 'I received this in the mail and believe it may be illegal. I received this by electronic mail, it involves the use of the U.S. Postal Service, and I believe that it may be illegal.' If you wish to do this, your supervisor may permit you to print this chain letter using your Government computer and printer.

Another approach is that you might reply to the sender and ask to be removed from her mailing list, advising her that she is sending this chain letter solicitation to a Federal electronic mail address. However, while this will work with a legitimate organization, don't know how successful you will be here.

Still another approach that the HELPDESK might explore is the use of FILTERS to eliminate unwanted "spam." This might cause more trouble than it is worth, e.g., catching and eliminating otherwise valid communications. I think that there are also places on the Internet where such unwanted "spammers" can be reported. **Mike Wentink** would be interested in any other ideas you have.

Ethics Focus

General Wilson on Ethics

The AMC Commander, General **Johnnie E. Wilson**, issued a policy statement on ethics to the AMC work force on 8 January 1998. In this memorandum, the CG states that

"Ethics is the backbone of the U.S. Army Materiel Command's mission and vision. Ethics is that core value by which we establish respect, confidence, and trust among ourselves, with our contractors, and with the American taxpayer."

General Wilson reminds AMC personnel that Ethics Counselors in AMC legal offices are responsible for our ethics training, advice and counsel. He highlights the need to attend training, to file timely financial disclosure reports, and to be particularly aware of and sensitive to the rules concerning gifts.

Importantly, the CG asks that you seek advice and counsel **before** you act.

The memorandum concludes with this statement by the CG:"We exist to support the soldier. Ethics is the linchpin by which we are able ultimately to accomplish this mission." Enclosure 19 contains this important memorandum.

Ethics Advisory: Gifts & Official Travel

HQ AMC's **Mike Wentink** recently sent an ethics advisory to all HQ, AMC employees, an excellent preventive law technique that is sure to increase awareness (Encl 20)

What if an outside source, such as a contractor or professional association, offers to pay some or all of your official travel expenses (including free attendance) to some event?

Can you accept them? Perhaps. There is a statute (31 U.S.C. Sec. 1353) that authorizes the acceptance of such gifts. But, there are rules, conditions and restrictions.

o Never solicit!

o If an outside source offers to pay you may not accept unless all of the following exist:

1. You must be in an "official" travel status.

2. Your travel must be to a meeting or similar event (as opposed to mission accomplishment), such as a seminar, symposium, or training course.

3. Your travel approving authority must approve in writing your acceptance of the gift on behalf of the Army after doing a conflict of interest analysis

4. Your Ethics Counselor concurs in the approval.

o If approved:

1. Payment in kind is preferred.

2. Never accept cash!

3. If reimbursement is by check, have it made payable to Department of the Army .

4. If value of gifts exceeds $250, you must submit a report to your Ethics Counselor. It will be forwarded to the Office of Government Ethics where it will be made available for public inspection.

Further information is provided in the enclosed Memorandum for Traveling the USAMC Employees (Encl 21).

Faces In The Firm

Arrivals

AMCOM

In October, ATCOM and MICOM merged to form AMCOM. The following personnel relocated from St. Louis to Redstone Arsenal: **Jeffrey L. Augustin**, **Christopher G. Barrett**, **H. Bruce Bartholomew**, **Charles H. Blair**, **Mary A. Claggett**, **Bruce F. Crowe**, **CPT Scott G. Gardiner**, **Robert H. Garfield**, **M. Bruce Jones**, **Robert L. Norris**, **Tina M. Pixler**, **Harvey Reznick**, **Lawrence A. Runnels**, **Suzanne B. Simmons**, **Arthur H. Tischer**, **Brian E. Toland**, **Tony K. Vollers**, and **CPT Christopher J. Wood**.

LT Jeffrey M. Neurauter joined the office in the Acquisition Law Division .He is currently attending the Basic Course at TJAGSA, to return tin April.

LT Martin N. White joined the Office of SJA in October. He was promoted to Captain on 1 January 1998.

WSMR

Welcome back to paralegal **Denise Judd**, who returned to work after surgery.

CECOM

LT Sandy Baggett arrived at CECOM 22 December 1997. She arrived from the Basic Course in Charlottesville, VA, and will serve with the Military Law Branch of the Staff Judge Advocate Division.

IOC

Captain Eugene Baime. and his wife Angie arrived in January to work in the Environmental area.

Stephanie Ringstaff, a Senior at Sherrard HS joined the office as a coop student.

A college paralegal intern **Amy DePau** joined the staff as part of her paralegal program requirements and will be interning in the office.

Mrs. JoAnn Lieving has joined the office as a Legal Assistant in the Acquisition Law area. JoAnn and her husband have one daughter and are expecting another child in February. Great to have you with us JoAnn!

Promotions

ARL

Effective 7 Dec 97, **Mr. Paul S. Clohan** was promoted to a GS-15, as the Chief , Intellectual Property Law Branch and **Ms. Angee K. Acton** was promoted to a GS-11 (Target GS-12) Paralegal Specialist position.

Effective 18 Jan 98, **Ms. Tina D. Shaner** was promoted to a GS-07, Legal Assistant position.

IOC

Ms. Martha Morris, Legal Assistant at McAlester Army Ammunition Plant, has been promoted. Martha's temporary promotion recently became permanent.

CECOM

Pat Terranova was promoted to chief of Business Law Division C, GS 905-15.

Jim Scuro was promoted from GS 905-13 to GS 905-14.

Maria Esparraguera was promoted from GS 905-13 to GS 905-14.

Faces In The Firm

Departures

AMCOM

ATCOM personnel who did not relocate to Alabama: **James H. Casey**, **Leonard E. Glaser** and **Carol P. Rosenbaum** decided to take a much earned retirement. **Robert C. Arendes, Jr.** has taken an attorney position with Social Security in St. Louis. **Stephanie A. Kreis** transferred to Defense Information Technology Contracting Organization (DITCO) at Scott Air Force Base. **John H. Lamming** is now with Washington University and is the first patent attorney there. **Michael L. Lissek** is an Administrative Law Judge for Social Security in New York City. **Jeffrey Asbed** and **Louise Ryterski** are now in private practice. **Anne Wright**, Claims Examiner, is working with United Van Lines in St. Louis.

Juan B. Gerala retired on 2 January 1998 after over 37 years of government service.

Peggy K. Anderson will retire from this office on 1 April 1998.

WSMR

CPT Frances Martellacci will PCS to Korea in February.

SGT James Mersfelder was deployed to Bosnia for six months.

TACOM-ARDEC

Bob McQuillan, Chief of the General Law Division, TACOM-ARDEC Legal Office, retired January 3rd, 1998, after 30 years of government service. Bob worked most of the time at Picatinny Arsenal with a short stint at Fort Monmouth. At a recent luncheon, he was overheard stating that he has never been happier and is looking forward to spending most of his time with his first grandchild who is expected in the next few months.

HQAMC

Elizabeth Buchanan has accepted a position with the DA Office of General Counsel, focusing in Fiscal Law and Ethics. Best of Luck!

IOC

Mrs. Stacy Johnson took advantage of the most recent VERA/VSIP and left Government service. She is now a stay-at-home mother. Stacy and her husband have two daughters, ages 12 and 3. Best of luck to Stacy.

Awards

TACOM-ARDEC

Martin I. Kane and **Denise C. Scott**, both received TACOM-ARDEC Technical Director's Technology Transfer Awards. Mr. Kane was recognized for his precedent setting M831A1 training round technology transfer license, while Ms. Scott was recognized for her continued exceptional support to the TACOM-ARDEC technology transfer program.

ARL

Kenneth J. Spitza and **Alvin E. Prather**, received a Time Off Award and a Certificate of Achievement for outstanding legal support to the Non-Appropriated Fund Instrumentality Council (NAFIC).

CECOM

Received at the CECOM awards ceremony 30 January 1998 were:

Howard Bookman received the DA Certificate of Achievement for his contribution to the LOGCAP project.

Mark Sagan received the Commander's Award for CECOM leadership in the executive category. He also received the CECOM bronze eagle and a $1000 US Bond.

Mike Zelenka received honorable mention for the same award.

Agenda
Commercial Activities Workshop

TUESDAY 13 January

0800-0805	WELCOME, INTRODUCTION	- CHARLES FOSTER
0805-0820	TECOM COMMANDER COMMENTS	- MG EDWARD L. ANDREWS
0820-0845	HQDA COMMENTS	- JIM WAKEFIELD
0845-0930	AAA COMMENTS	- EVERETT FOSS
0930-0945	BREAK	
0945-1030	MEA LESSONS LEARNED	- DAVE HENDERSON
1030-1115	NAF IMPACTS	- BOB CRAWLEY
1115-1200	CA STUDY APPROACHES	- JAMES A. TILLMAN, JR.
1200-1300	LUNCH	
1300-1330	CA: LEGAL AND PERSONNEL IMPLICATIONS	- Cassandra Johnson
1130-1410	CURRENT CA LEGAL ISSUES AGGREGATING REQUIREMENTS TRANSFER STUDIES ISSAs	- ALFRED MOREAU
1410-1420	BREAK	
1420-1440	CA IN THE CONTEXT OF DEPOTS AND ARSENALS	- DAVID HARRINGTON
1440-1520	GAO PANEL: CHALLENGES CONFRONTING BOTH THE FEDERAL SECTOR AND THE DEPARTMENT OF DEFENSE PANELISTS: DONALD L. BUMGARDNER PROJECT MANAGER GENERAL GOVERNMENT DIVISION U.S. GENERAL ACCOUNTING OFFICE BARRY W. HOLMAN ASSOCIATE DIRECTOR FOR DEFENSE MANAGEMENT ISSUES NATIONAL SECURITY AND INTERNATIONAL AFFAIRS DIVISION U.S. GENERAL ACCOUNTING OFFICE	
1520-1530	BREAK	
1530-1630	CONGRESS AND THE BUSINESS COMMUNITY- HOW THEY VIEW COMMERCIAL ACTIVITIES FOR THE FEDERAL SECTOR PANELISTS: ROBERT L. RAASCH ASSOCIATE MANAGER DOMESTIC POLICY U.S. CHAMBER OF COMMERCE JEFFREY ALAN EHRENBERG	

SENIOR LEGISLATIVE ASSISTANT FOR
PRIVATIZATION
OFFICE OF CONGRESSMAN SCOTT KING

ROBERT SHEA
LEGISLATIVE DIRECTOR
OFFICE OF CONGRESSMAN PETE SESSIONS

WEDNESDAY 14 JANUARY

I 0800-1600 TUTORIAL

II STRATEGY WORKSHOPS:

		BREAK OUT ROOM		
	1	2	3	4
0800-1200	COMMUNICATIONS	PWS	ACQUISITION	QASP
1300-1600	TRANSITION PLANNING	MEO	COST ANALYSIS	TPP

THURSDAY 15 JANUARY

0800-0930 FUNDING WORKSHOP
0930-0945 BREAK
0945-1030 REPORTING REQUIREMENTS
1030-1100 REPORT OUT - COMMUNICATIONS
1100-1130 " " - ACQUISITION
1130-1200 " " - TRANSITION PLANNING
1200-1300 lunch
1300-1330 REPORT OUT - COST ANALYSIS
1330-1400 " " – PWS
1400-1430 " " - QASP
1430-1445 BREAK
1445-1515 " " - TPP
1515-1545 " " - MEO
1545-1630 WRAP UP

LABOR RELATIONS AND CONTRACTING OUT
REVERSING THE TIDE

> "Americans want to 'get their money's worth' and want a Government that is more businesslike and better managed. The reinvention of Government begins by focusing on core mission competencies and service requirements. Managers must begin by asking some fundamental questions, like: why are we in this business, has industry changed so that our involvement or level of involvement is no longer required; is our approach cost effective and, finally, assuming the Government has a legitimate continuing role to play, what is the proper mix of in-house, contract and interservice support agreement resources . . . The OMB Circular A-76 Revised Supplemental Handbook is designed to enhance Federal performance through competition and choice." Introduction, Notice of Transmittal Memorandum No. 15, to the OMB Circular No. A-76, "Performance of Commercial Activities, Revised Supplemental Handbook." April 1, l996, 61 FR 14338.

I. WHY IS CONTRACTING OUT BECOMING SUCH A HOT ISSUE TODAY?

A. 1980s -- Federal agencies' attempts to use Office of Management and Budget (OMB) Circular A-76 creates Congressional backlash - series of anti-A-76 protective statutes enacted (e.g., 10 USC 2461 and Public Law (PL) 99-661, Section 317).

B. 1990s.

1. Limited Federal dollars--stagnant or declining agency budgets.

2. Bipartisan support for cutting down the Federal government and making it leaner and more cost effective.

3. President's Reinventing Government Program.

a. March 3, 1993, President Clinton asked Vice President Gore to lead the National Performance Review (NPR), a campaign to reinvent government.

b. Phase I: Putting customers first; cutting red tape;

empowering employees to get results; and cutting back to basics.

c. Phase II: Cutting Back to Basics - February 13, 1995, Privatization Resource Guide and Status Report (Draft).

> "Basics means taking a hard look at what, the government does and determining what changes to make in federal programs and functions, if any;...moving the service delivery capability to the most effective provider.... In general, a refocusing and downsizing of federal activities will result." (Page 1).
>
> "This is not a privatization exercise . . . This is a most cost effective alternative exercise. It would be irresponsible to do privatization for the sake of privatization. Privatization itself is not the goal. It's only a tool." Julia Stasch, GSA Deputy Administrator. (Page 9).

II. STATUTORY AND REGULATORY FRAMEWORK.

A. OMB Circular No. A-76, Performance of Commercial Activities, August 4, l983.

B. OMB Circular No. A-76, Revised Supplemental Handbook (March 1996).

C. Office of Federal Procurement Policy Letter (OFPP Letter) 92-1, Inherently Governmental Functions (57 FR 45096, September 30, 1992). This sets the policy for Executive departments and agencies that certain functions are inherently governmental functions that must only be performed by Government officers and employees. The functions include those activities that require either the exercise of discretion in applying Government authority or the making of value judgments in making decisions for the Government. Governmental functions normally fall into two categories: (1) the

act of governing, i.e., the discretionary exercise of Government authority; and (2) monetary transactions and entitlements.

D. Federal Acquisition Regulation Subpart 7.5, Inherently Governmental Functions, January 26, 1996, 61 FR 2628. This implements OFPP Letter 92-1. The premise is that it's a policy matter, not a legal determination, that a function is so intimately related to the public interest as to mandate performance by Government employees.

E. Federal Workforce Restructuring Act of 1994, PL 103-226, March 30, 1994. It requires the reduction of federal full-time equivalent positions (FTE) between 1994 and 1999 of approximately 272,900. Section 5(g) requires the President to take appropriate action to ensure that agencies not convert the work of employees included in the reduction target or the work of employees that accept a buyout to contract performance, unless a cost comparison demonstrates that there is a financial advantage to the Government.

III. RELATED STATUTES AND REFERENCES.

A. Conflict of Interest laws, 18 USC 201 et seq., generally prohibit any federal employee from engaging in official activities that could conflict with personal interests.

B. Procurement Integrity Act, 41 USC 423, governs the relationships between government officials and current or potential contractors.

C. Government Ethics Newsgram, Summer, 1995, Volume 12, No.2, U.S. Office of Government Ethics.

D. Chief Financial Officers Act of 1990, PL 101-576, November 15, 1990, provides new tools to improve the management of the Federal government by establishing Chief Financial Officers in 23 major Executive agencies as well as a new Deputy Director of Management and a Comptroller in the Office of Management and Budget, and establishing Federal accounting standards,

integrate and modernize the Government's financial systems, and produce audited financial statements.

E. Government Performance and Results Act of 1993, PL 103-62, August 3, l993, in response to the American public's "disdain for government and objections to paying higher taxes," the Act improves the efficiency and effectiveness of Federal programs by establishing a system to set goals for program performance and to measure results in order to reduce waste, inefficiency and ineffectiveness in Federal programs.

F. Government Management Reform Act of 1994, PL 103-356, October 13, l994, was enacted in response to both Congressional concern that the Federal Government be accountable for the spending of taxpayers' dollars and to the NPR's report, "From Red Tape to Results," that concludes that "those in positions of responsibility must have the information they need to make good decisions." It essentially expands the coverage of the 1990 Chief Financial Officers Act to provide for annual audited financial reports of all the activities, spending and revenues of 24 major Government departments and agencies reports; establishes pilot programs to create franchising operations that will consolidate administrative support services, improve competition and cut costs; and promotes electronic funds transfer for Federal wages, salaries, and retirement payments.

IV. HISTORICAL BACKGROUND.

A. In 1955, the Senate Select Committee on Small Business stated that government agencies should give high priority to eliminating competition with the private sector.

B. The Second Hoover Commission (1955) endorsed the policy of "Eliminating Government-operated services and functions that compete with private enterprise.

C. Bureau of the Budget Bulletin (BOB) 55-4 (1955) stated that the "public sector shall not carry on any commercial activity to provide a product or service for

its own use, if such products and services can be obtained through ordinary business channels from private enterprise.” Similar policy expressed in Budget Bulletins issued in 1957 and 1960.

D. Circular A-76 of 1966 issued for the first time which prescribed policy and implementing guidelines in BOB Bulletin 55-4 in a permanent directive.

E. The Circular underwent revisions in 1967 to clarify some provisions and to lessen the burden of work by agencies in implementation, and in 1976 to provide additional guidance on cost comparisons and prescribing standard cost factors for Federal employee retirement and insurance benefits.

F. Revised Circular A-76 issued in 1979 which included a Cost Comparison Handbook to ensure consistent and equitable cost comparisons and provisions for the protection of Federal employees (“sunshine” access to reviews, appeals procedure, 10% cost differential favoring in-house performance, and requirement that contractor give right of first refusal to qualified Government employees).

G. Revised Circular A-76 issued in 1983.

V. HIGHLIGHTS OF CHANGES TO THE REVISED OMB CIRCULAR A-76 SUPPLEMENT.

A. **Cost comparison requirements**. Modifies and in some cases eliminates cost comparison requirements for recurring commercial activities and the establishment of new or expanded interservice support agreements.

B. **Listing of commercial activities**. Retains current listing of commercial activities attached to the August 1983 Circular A-76 and includes OFPP Policy Letter 92-1 guidance on what is "Inherently Governmental Functions.”(See Supplement, Appendix 5).

C. **Reliance on the private sector**. Revision retains 1983 Supplement's requirements to contract new or expanded work, unless a cost comparison is conducted to

support conversion to in-house or interservice support agreement performance. It also requires conversion to contract only when it’s cost effective. It doesn't require conversion of in-house work to contract, as a matter of policy, without cost comparison.

D. **Exemptions from cost comparison**.

1. Circular itself exempts certain recurring commercial activities from cost comparison, including mobilization requirements within the Department of Defense, the conduct of research and development and direct patient care activities in Government hospitals or other health facilities. The Revision clarifies this policy to permit exempt activities to be retained in-house or converted to or from in-house, contract or interservice support agreement performance, without cost comparison.

2. The list of exempted activities has been expanded to include national security activities, mission critical core activities and temporary emergency requirements. The determination of "core" functions is, fundamentally, a management decision.

E. **Reduces reporting and other administrative burdens**. Eliminates previously required study schedules and quarterly study status reporting as unnecessary and administratively burdensome. Agencies are still required to maintain an inventory of commercial activities with information on completed cost comparisons.

F. **Waivers**. Broadens an agency's authority to waive cost comparisons to convert to or from in-house, contract or interservice support agreement without cost comparison if it is found that (a) the conversion will result in a significant financial or service quality improvement and that the conversion will not serve to reduce significantly the level or quality of competition in the future award or performance of work or (b) there is a finding that the in-house or contract (in the case of a possible conversion from contract to in-house performance) offers have no reasonable expectation of winning a competition (for example, when an agency

conducts a major independently conducted business analysis). Broadens the agency's authority to waive by delegating it down from the Secretary to the Assistant Secretary level. Within DOD this has been further delegated down to the Assistant Service Secretaries.

G. **Provides for enhanced employee participation**. Since the 1983 Supplement was silent on the subject, the revision clarifies employee participation opportunities and formalizes the requirement for agencies to consult with employees and their labor representatives for their full participation and involvement in the earliest possible stages of the procurement process. Agencies are requested to afford employees and private sector interests an opportunity to comment on solicitations prior to the opening of bids. Revision also affords parties additional time to submit cost comparison appeals.**(See Chapter 1, Section G).**

1. Full participation in the development of performance standards, the Performance Work Statement (PWS), in-house management plan, Most Efficient Organization (MEO), and in-house and cost estimates, subject to the restrictions of the procurement process and conflict of interest statutes.

2. Upon issuance, a solicitation used in the conduct of the cost comparison will be made available to directly affected Federal employees or their representatives for comment. The employees or their representatives will be given sufficient time to review the document and submit comments before final receipt of offers from the private sector. Private ector offerors shall comment as provided by the Federal Aqcuisition Regulations.

3. Agencies shall make all relevant documents available for review as part of the administrative appeal process.

H. **Performance standards**. Though the 1983 Supplement did not permit conversion decisions to be based on the comparison of performance measures or standards, the revision does permit conversion to or from in-house,

contract or interservice support agreement performance if the agency determines that performance meets or exceeds generally recognized performance and cost standards.

I. **Eases transition requirements to facilitate employee placement**. The revision authorizes the conversion of functions involving 11 or more FTEs to contract performance, without cost comparison, if fair and reasonable prices can be obtained from qualified commercial sources and all directly affected federal employees serving on permanent appointments are reassigned to other comparable federal positions for which they are qualified. This provision is limited to competitive awards only. There is no requirement that restricts placement efforts within the federal employee's commuting area. **Note**, no commercial activity shall be modified, reorganized, divided or in any way changed for the purpose of circumventing the requirements of this provision.

J. **The 10 FTE or Less Rule**. The revision expands the 1983 supplement's rule that permits the conversion of a function to contract performance without cost comparison - even with adverse employee impacts - to the conversion of similarly sized activities to in-house or interservice support agreement performance, without cost comparison. The 10 FTE or Less Rule is a recognition that there is a break-even point where the cost of conducting the comparison is not likely to outweigh the expected benefits while cost comparisons at the 11-50 FTE levels do result in significant most efficient organization (MEO) and competition savings.

K. **MEO Implementation**. Requires agencies to develop a transition plan for each competitive solicitation. This facilitates agencies planning for employee placements and a more orderly transition of work to or from in-house, contract or interservice support agreement.

L. **Post MEO Performance Reviews**. Revision requires agencies to conduct Post-MEO Performance reviews on not less than 20% of all functions are retained or converted

to in-house performance as a result of a cost comparison. This will ensure that the MEO was properly estimated and implemented and the work is being performed in accordance with the terms, quality standards and costs specified in the Performance Work Statement (PWS).

M. **The streamlined cost comparison alternative**. In addition to the generic cost comparison methodology, a streamlined cost comparison process has been developed for activities involving 65 FTEs or less. **Note**, management cannot modify, reorganize, divide or in any way change a commercial activity involving 66 or more FTEs for the purpose of using the streamlined cost comparison procedure.

N. **Source Selection**. Criticism levied against the 1983 Supplement was that it was too cost determinative and it relied too heavily on the low bid offer. The Revision allows for "best value" and "past performance" type concepts to be used in A-76 cost comparison process using competitive negotiation or source selection.

O. **Appeals**. The Revision extends to time frame for appeals to be submitted from 15 working days to 20. The agency may extend the appeal period to a maximum of 30 working days if the cost study is particularly complex; expands scope of appeals to include formal information denials, instances of clear A-76 policy violations, and clarifies that streamlined and sector specific cost comparisons are subject to appeal. Not accepted for appeal basis was an agency's decision to reorganize, that appeals be decided by another agency and agency's decision to conduct or not conduct a cost comparison.

P. **Right of First Refusal - Personnel Considerations**. Expands the Right of First Refusal first established by the 1979 Supplement. **(See Chapter 1, Section H).**

1. Adversely affected Federal employees are employees identified for release from their competitive level by an agency in accordance with 5 CFR Part 351 as a direct result of a decision to convert to contract,

ISSA performance or the agency's MEO.

2. The right of adversely affected federal employees for first refusal for jobs created as a result of the decision to convert to contract or ISSA performance and for which they are qualified has been expanded to extend the right to existing and to subsequent contractor employees in the original or follow-on contracts, as provided for in Executive Order 12933, “Non-Displacement of Qualified Workers Under Certain Contracts."

3. Agencies should exert maximum efforts to find available positions for Federal employees adversely affected by conversion decisions including priority consideration for available positions within the agency, establishing a reemployment priority list and an effective placement program, and paying reasonable costs for training and relocation that contribute directly to placement.

VI. FEATURES OF THE A-76 PROCESS.

A. Exceptions to the OMB Circular A-76 cost comparison requirement to convert these activities to or from in-house, contract or ISSA.

1. National Defense of Intelligence Security.

2. Patient Care.

3. Core Capability.

4. Research and Development.

5. No satisfactory commercial source available.

6. Functions with 10 or fewer FTEs.

7. Meet or exceed generally recognized industry performance and cost standards.

8. Lower cost - as result of a cost comparison conducted with the Supplement procedures.

9. Temporary and emergency authorizations for in-house performance - when contractor defaults or is otherwise terminated, agencies should seek interim contract support, if feasible, otherwise, in-house or ISSA performance of a “contracted” activity may be authorized on a temporary and emergency basis.

B. Cost Comparison - Full Procedure **(Part I, Chapter 3)**

1. **Development of the Performance Work Statement (PWS) - (Section C)**. Defines what is being requested, the performance standards and measures, and time frames required. It provides the technical performance sections of the Request for Proposals (RFP), or Invitation for Bid (IFB), issued by the contracting officer.

2. **Development of the Quality Assurance Surveillance Plan (QASP) - (Section D)**. QASP describes the methods of inspection to be used, the reports required and the resources to be employed with estimated work-hours.

3. **Development of the Management Plan for the Most Efficient Organization (MEO) - (Section E)**. Describes the Government’s most efficient organization and is the basis of the Government’s in-house estimates. It must reflect the scope of the PWS, should identify the organizational structures, staffing and operating procedures, equipment, transition and inspection plans necessary to ensure that the in-house activity is performed in an efficient and cost effective manner. Should include all initiatives and assumptions factored into developing the MEO.

4. **Development of cost estimates and reviews by the agency's A-76 Independent Review Officer (IRO) - (Section I)**. Government's cost estimates are certified in writing as being in full compliance with the procedures and requirements of the Supplement. The PWS, Management Plan, QASP and all Government developed cost estimates with supporting documentation are forwarded to the agency IRO. (In Army's case, review is by U. S. Army

Audit Agency).

5. **Bids or proposals solicited from private industry - (Section H)**. All competitive methods of federal procurements provided for by the Federal Acquisition Regulation (FAR) are appropriate, including the sealed bid, two-step, source selection and other competitive qualification based or negotiated procurement techniques. A “best value” contract offer consideration is an acceptable criterion for selection.

6. **Evaluation of bids and tentative decisions - (Section J)**. Evaluation of bids and tentative decision are made pending outcome of evaluation of bids for responsiveness, responsibility and resolution of possible administrative appeals of any appeals. For sealed bid procurements, the contracting officer opens the bids, including the Government's in-house cost estimate, and enters the price of the apparent low offeror on the Cost Comparison Form (CCF). The appeal process period begins when access to the completed CCF, and all supporting documentation, is provided to affected parties for review, usually the day of the bid opening.

7. **Public review and appeal period** - **(Sections J and K)**. Must be received within 20 calendar days after the date that all supporting documentation is made publicly available. The agency may extend to appeal period to a maximum of 30 days for a particularly complex cost comparison.

a. Basis will address specific questions regarding the agency's compliance with the requirements and procedures of the Circular, factual questions regarding agency justifications to waive a cost comparison (doesn't include right to appeal a decision not to issue a waiver, Chapter I, Section E4), or address specific questions regarding the costs entered by the Government on the applicable Cost Comparison Form. It will provide the rationale for questioning those items.

b. Identify specific instances of agency denials of information not otherwise protected by law or

regulation. Demonstrate that the items appealed, individually or in the aggregate, would reverse the tentative decision.

c. An appeal can be submitted by an eligible appellant defined as Federal employees (or their representatives) and existing Federal contractors affected by a tentative decision to waive a cost comparison; federal employees (or their representatives) and contractors that have submitted formal bids or offers who would be affected by a tentative decision to convert to or from in-house, contract or ISSA performance as a result of a cost comparison; or agencies that have submitted formal offers to compete for the right to provide services through ISSAs.

d. Agency A-76 Administrative Appeal procedures do not apply to questions concerning the selection of one contract offeror or another for competition with the in-house cost estimate; award to one contractor in preference to another; Government management decision involving the Government's certified in-house MEO, and the policies or procedures contained in the Circular and the Supplement.

e. The procedure does not authorize an appeal outside the agency or judicial review, nor does it authorize sequential appeals.

8. **Decision to award contract or cancel solicitation - (Section K)**. The appeal procedure should provide for a final decision within 30 days of the appeal by the Appeal Authority.

9. **Transition period - (Section E4d)**. Included in the Management Plan is the transition plan for the transition to or from current organizational structure to MEO, contract or ISSA performance, designed to minimize disruption, adverse impacts, capitalization and start-up requirements.

10. **MEO or contract operational.**

11. **Post-MEO Performance Review - (Section L)**.

When the MEO is selected as a result of the cost comparison, a formal review and inspection of the MEO should be conducted following the end of the first full year of performance. Post-MEO Performance Reviews will be conducted on not less than 20% of the functions performed by the Government as a result of a cost comparison. An annual list of Post-MEO Performance Review certifications will be made available to the public upon request. This list will identify the total number of cost comparisons completed since the issuance of the Revised Supplemental Handbook and the number of Post-MEO Performance Reviews completed.

C. Agency specific A-76 procedures can implement above general provisions and may include additional steps for undertaking A-76 cost comparison process.

D. Minimum threshold of defined costs that must be exceeded prior to the conversion to or from in house, contract or ISSA performance is established to ensure that the Government will not undertake a conversion for marginal estimated savings. The minimal cost differential is the lesser of 10% of the in-house personnel-related costs or $10 million over the performance period. Factors such as decreased productivity, and other costs of disruption that cannot be easily quantified at the time of the cost comparison are included in this differential. **(Part II, Chapter 2, Section 8)**.

F. Streamlined Cost Comparisons for Activities with 65 FTE or Less. **(Part II, Chapter 5)**.

1. Employees' participation and notification provisions are same as for full cost comparisons.

2. Upon notification of adversely affected Federal employees and publication of the tentative decision in the Commerce Business Daily to either contract, enter into an ISSA, or to retain the activity in-house, the A-76 Administrative Appeal process applicable to full cost comparisons will be initiated.

3. The Right-of-First-Refusal will be offered to

employees adversely affected by the award.

VII. EXAMPLES OF RECENT CONTRACTING OUT/OUTSOURCING/PRIVATIZATION INITIATIVES AT FEDERAL AGENCIES.

A. OPM training and investigations.

B. IRS.

C. DOE.

D. DOT-FAA.

E. DOD.

1. Quadrennniel Defense Review, May 1997.

2. Army.

3. Navy.

4. Air Force.

F. HUD.

G. GSA.

VIII. CURRENT CHALLENGES TO FEDERAL AGENCY CONTRACTING OUT/OUTSOURCING/PRIVATIZATION INITIATIVES.

IX. THE FUTURE OF OMB CIRCULAR A-76 ACTIONS.

A. Chief Financial Officers view.

B. OMB view.

X. LEGISLATION.

A. S314 and HR 716, Freedom from Government Competition Act of 1997, Introduced 12 February 1997.

B. Statutory A-76 Scheme.

CASSANDRA TSINTOLAS JOHNSON
Society of Federal Labor Relations Professionals Spring Conference
1997 4 June l997

LABOR RELATIONS ISSUES IN CONTRACTING OUT

Linda B. R. Mills
U.S. Army Materiel Command
Office of Command Counsel
March 1997

Excerpts from applicable statutory provisions of the Federal Service Labor-Management Relations Act (also referred to as Title VII of the Civil Service Reform Act of 1978):

Management Rights - 5 USC 7106

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency -

(2) in accordance with applicable laws -

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted...

(b) Nothing in this section shall preclude any agency or any labor organization from negotiating

(2) procedures which management officials of the agency will observe in exercising any authority under this sections; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

Representation Rights - 5 USC 7114

(a)(1) A labor organization which has been accorded exclusive recognition...is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit...

Duty to bargain in good faith - 5 USC 7117

(a)(1) ...the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

Grievance Procedures - 5 USC 7121

(a)(1) ...any collective bargaining agreement shall provide procedures for the settlement of grievances...

(b) Any negotiated grievance procedure...shall -

(3) include procedures that -

(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration...

Definition of a Grievance - 5 USC 7103(a)(9)

(9) 'grievance' means any complaint -

(C) by any employee, labor organization, or agency concerning -

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

Union Rights to Information - 5 USC 7114(b)(4)

[The duty to negotiate in good faith includes the obligation -]

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data -

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials relating to collective bargaining...

YES, NO, YES, NO, MAYBE

OR

ARE CONTRACTING OUT PROPOSALS NEGOTIABLE?

At the most basic level, the answer to the above question depends on how one reconciles management's authority to make determinations with respect to contracting out under 5 USC 7106(a)(2)(B) with the union's rights to bargain in accordance with 5 USC 7114(a)(4) and to grieve "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment" pursuant to 5 USC 7121.

One might expect that a decision from the Supreme Court of the United States would provide a reliable answer to the above question, but the Federal Labor Relations Authority (FLRA or the Authority) is not easily persuaded to limit the scope of bargaining.

In 1990, the Supreme Court reviewed a union proposal to adopt its negotiated grievance procedure as the administrative appeals process required by OMB Circular A-76. This would allow employees to use the collective bargaining agreement's grievance and arbitration provisions to contest contracting out decisions.

The FLRA held that the Internal Revenue Service was required to bargain over this proposal. The U.S. Court of Appeals for the District of Columbia Circuit affirmed. In a six to three decision written by Justice Scalia, the Supreme Court reversed and remanded:

Department of the Treasury, IRS vFLRA, 494 US 922 (1990).

According to Justice Scalia: "The FLRA's position is that the management rights provisions of Sec. 7106 do not trump Sec. 7121, which entitles the union to negotiate and enforce procedures for resolving any 'grievance' as defined in Sec. 7103 -- that is, any claimed 'violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.'...Thus, according to the FLRA, it makes no difference whether OMB Circular A-76 is an 'applicable law' [under 5 USC 7106(a)(2)]; so long as it is a 'law, rule, or regulation' within the meaning of Sec 7103(a)(9)(C)(ii), Sec. 7106(a) does not bar mandatory negotiation..." The Supreme Court concluded that "the FLRA's construction is not reasonable."

In essence, the Court held that the management rights provisions of 5 USC 7106(a) supersede the grievance provisions of 5 USC 7121 regardless of whether or not OMB Circular A-76 is an "applicable law":

> Section 7106(a) says that, insofar as union rights are concerned, it is entirely up to the IRS whether it will comply at all with Circular A-76's cost-comparison requirements, except to the extent that such compliance is required by an "applicable law" outside the [Civil Service Reform] Act.

The Court did not decide whether or not Circular A-76 is an "applicable law" under 5 USC 7106(a), nor whether it is a "law, rule, or regulation" under 5 USC 7103. Furthermore, the Court did not consider IRS's argument that the union's proposal could also be held nonnegotiable under 5 USC 7117(a)(1) as a "Government-wide rule or regulation" prohibiting arbitration.

Justice Stevens agreed with the Court's conclusion that the union's proposal was nonnegotiable, but dissented because he would have held either that Circular A-76 placed no limitations on management rights under 5 USC 7106(a) because it is not an ìapplicable law;" or that Circular A-76 would certainly have to be considered a nonnegotiable "Government-wide rule or regulation" under 5 USC 7117(a)(1).

Justice Brennan, joined by Justice Marshall, dissented on the theory that the union's proposal should have been viewed as negotiable even if Circular A-76 were considered to be both an "applicable law" and a "Government-wide rule or regulation" because the proposal "would not affect the Internal Revenue Service's authority to make contracting out decisions."

On remand, the FLRA concluded that Circular A-76 was an "applicable law" within the meaning of 5 USC 7106(a) and that a union's negotiated grievance procedure could be used to challenge alleged failures by the agency to comply with its requirements. NTEU and Dept. of Treasury, IRS, 42 FLRA 377 (1991) [enforcement denied, Dept. of Treasury, IRS v. FLRA, 996 F.2d 1246 (D.C. Cir. 1993)]. The Authority contended that unions could seek to enforce Circular A-76 as an "applicable law" under negotiated grievance procedures even if the Circular itself appears to preclude such grievances. In subsequent cases, the FLRA held that a proposal requiring compliance with Circular A-76 could also be found negotiable under 5 USC 7106(b)(3) as an "appropriate arrangement for employees who are adversely affected by management's decision to contract out." NTEU and Dept. of Treasury, Bureau of Pub. Debt, 42 FLRA 1333 (1991) [enforcement denied, Dept. of Treasury, IRS v. FLRA, 996 F.2d 1246 (D.C. Cir. 1993)].

Dept. of Treasury, IRS v. FLRA, 996 F.2d 1246 (D.C. Cir. 1993).

When the D.C. Circuit reviewed FLRA decisions which continued to find union proposals negotiable even after the Supreme Court issued its decision in 1990, it applied the reasoning of Justice Steven's dissent. Accordingly, it held that Circular A-76 is nonnegotiable as a "Government-wide rule or regulation" under 5 USC 7117(a) whether or not it is an "applicable law" under 5 USC 7106(a). Furthermore, it reached the rather obvious conclusion that "collective bargaining over the method for resolving disputes concerning application of the Circular and arbitration of claimed 'violations' of the Circular would both be inconsistent with the terms of the Circular":

> We hold that if a government-wide regulation under section 7117(a) is itself the only basis for a union grievance - that is, if there is no preexisting legal right upon which the grievance can be based - and the regulation precludes bargaining over its implementation or prohibits grievances concerning alleged violations, the Authority may not require a government agency to bargain over grievance procedures directed at implementation of the regulation. When the government promulgates such a regulation, it may not be hoisted on its own petard.

The D.C. Circuit Court also noted that: "Unlike the exemption in the management's rights section, the government-wide regulation exception to an agency's obligation to bargain is not conditioned by the need to bargain over 'appropriate arrangements'."

The Authority continued to resist what might by then have appeared to be an inevitable conclusion. In cases such as NTEU and Dept. of Treasury, 47 FLRA 304 (1993), it continued to uphold the negotiability of provisions requiring agency compliance with Circular A-76.

Shortly thereafter, however, in AFGE Local 1345 and Dept. of Army, Fort Carson, 48 FLRA 168 (1993), the Authority surrendered to the views of the D.C. Circuit Court.

AFGE Local 1345 and Dept. of Army, Fort Carson, 48 FLRA 168(1993).

"We adopt the Court's conclusion [in Dept. of Treasury, IRS v. FLRA, 996 F.2d 1246 (D.C. Cir. 1993)] that Circular A-76 is a Government-wide regulation and that proposals subjecting disputes over compliance with the Circular to resolution under a negotiated grievance procedure are nonnegotiable. Previous decisions to the contrary will no longer be followed."

The Authority also conceded the fact that proposals which are inconsistent with a Government-wide regulation such as Circular A-76 could not be held negotiable as "appropriate arrangements" under 5 USC 7106(b)(3).

The Authority continues to rely on the Fort Carson case in finding union proposals nonnegotiable if the proposals would infringe on management rights under 5 USC 7106(a) or if, contrary to 5 USC 7117(a), they are inconsistent with Circular A-76:

In IFPTE Local 3 and Dept. of Navy, Philadelphia Naval Shipyard, 51 FLRA No. 40 (Oct. 31, 1995) [Proposal #2], the Authority held that proposals such as those prohibiting an agency from contracting out any function that had undergone a reduction-in-force (RIF) for a 1-year period following the effective date of the RIF were nonnegotiable under 5 USC 7106(a)(2)(B): "Proposals prescribing when a management right may be exercised constitute substantive limitations on, and directly interfere with the exercise of, that right. See, e.g., National Guard Bureau, 49 FLRA at 890. By prohibiting the Agency from exercising its right to contract out during the specified time period, Proposal 2 constitutes such a substantive limitation. Accordingly... we find that Proposal 2 affects the exercise of management's right, under section 7106(a)(2)(B), to make determinations with respect to contracting out."

In AFGE Local 151 and Dept. of Navy, Naval Air Station Whidbey Island, 52 FLRA No. 70 (Dec. 20, 1996) the Authority again relied on its Fort Carson decision in upholding an Arbitrator's award. The arbitrator found that the claim of a violation of OMB Circular A-76 or the Supplemental Handbook thereto does not concern a grievable or arbitrable matter. The Authority agreed: "[E]ven though determinations regarding contracting out must be made in accordance with the Circular, the Circular itself bars grievances under the negotiated grievance process. As such, the Arbitrator correctly held that the grievance is not arbitrable."

IMPACT & IMPLEMENTATION BARGAINING

OR

WHAT IF THE UNION PROPOSAL IS NOT INCONSISTENT WITH A-76?

If a union proposal neither incorporates nor conflicts with OMB Circular A-76, the union may be able to successfully argue that it is negotiable under 5 USC 7106(b)(2) as a procedure for implementing management's right to contract out or under 5 USC 7106(b)(3) as an appropriate arrangement for employees adversely affected by the contracting out determination. Although the Authority's decision in Department of Army Headquarters, Fort Sill and NFFE, 29 FLRA 1110, 29 FLRA No. 82 (1987) actually concerned an election, rather than bargaining rights, it does contain the flat statement that "...impact and implementation bargaining concerning contracting out is within the duty to bargain."

In the context of contracting out, where many of the procedures are controlled by Circular A-76, most of the cases dealing with I & I bargaining focus on "impact" (i.e., "appropriate arrangements") rather than "implementation" (i.e.,"procedures").

HOW CAN YOU DISTINGUISH A NEGOTIABLE APPROPRIATE ARRANGEMENT FROM AN INFRINGEMENT OF MANAGEMENT'S RIGHT TO CONTRACT OUT ?

As recently as October 30, 1996, the Authority confirmed that the approach it still uses for determining whether or not a proposal is within the duty to bargain under 5 USC 7106(b)(3) is set out in NAGE, Local R14-87 and Kansas Army National Guard (KANG), 21 FLRA 24; 21 FLRA No. 4 (February 7, 1986). Under KANG, the FLRA initially determines whether the proposal is intended to be an arrangement for employees adversely affected by the exercise of a management right. In order to address this threshold question, a union should identify the management right or rights claimed to produce the alleged adverse effects, the effects or foreseeable effects on employees which flow from the exercise of those rights, and how those effects are adverse. The alleged arrangement must be tailored to compensate or benefit employees suffering adverse effects attributable to the exercise of management rights. If the proposal is an arrangement, the Authority determines whether it is appropriate or is inappropriate because it excessively interferes with the relevant management right. AFGE, Local 1687 and VA, 52 FLRA No. 48 (1996).

NAGE, Local R14-87 and Kansas Army National Guard (KANG), 21 FLRA 24; 21 FLRA No. 4 (February 7, 1986).

"Once the Authority has concluded that a proposal is in fact intended as an arrangement, the Authority will then determine whether the arrangement is appropriate or whether it is inappropriate because it excessively interferes. This will be accomplished, as suggested by the D.C. Circuit [in American Federation of Government Employees, AFL-CIO, Local 2782 v. Federal Labor Relations Authority, 702 F.2d 1183 (D.C. Cir. 1983)], by weighing the competing practical needs of employees and managers. In balancing these needs, the Authority will consider such factors as:

(1) What is the nature and extent of the impact experienced by the adversely affected employees, that is, what conditions of employment are affected and to what degree?

(2) To what extent are the circumstances giving rise to the adverse affects within an employee's control?...

(3) What is the nature and extent of the impact on management's ability to deliberate and act pursuant to its statutory rights, that is, what management right is affected; is more than one right affected; what is the precise limitation imposed by the proposed arrangement on management's exercise of its reserved discretion or to what extent is managerial judgment preserved?...

(4) Is the negative impact on management's rights disproportionate to the benefits to be derived from the proposed arrangement?...

(5) What is the effect of the proposal on effective and efficient government operations, that is, what are the benefits or burdens involved?

These considerations are not intended to constitute an all-inclusive list. As frequently noted in the opinions of various judicial and quasi-judicial entities, an adjudicative body must consider the totality of facts and circumstances in each case before it. Additional considerations will be applied where relevant and appropriate. Inasmuch as a ritualistic or mechanistic approach is neither suggested, nor contemplated, the Authority will expect the parties to cases of this nature filed in the future to address any and all relevant considerations as specifically as possible."

Beyond the Federal Service Labor-Management Relations Act

I. Access to Information

If the union's requests for information are unrelated to a matter within the scope of bargaining, it cannot rely on 5 USC 7114(b)(4) to obtain that information. The union can, however, submit requests under the Freedom of Information Act, 5 USC 552, provided that it is willing to be treated the same as any other private citizen. More importantly, however, the union can rely on the formalized requirements for agencies to consult with labor representatives under OMB Circular A-76 with Revised Supplemental Handbook (March 1996).

II. Challenges to Contracting Out Decisions

A. The fact that unions have not been able to rely on their negotiated grievance procedures to challenge management's substantive decisions to contract out does not mean that they have no recourse to seek review of management decisions. The union representatives of federal employees "that will or could be impacted by a decision to waive a cost comparison or have submitted bids to convert to or from in-house, contract or ISSA performance, as a result of a cost comparison" are "affected parties" as defined by the A-76 Supplemental Handbook, and have access to the administrative appeals process required by A-76.

B. It is not yet clear whether or not federal employees and unions will have standing to bring suits in federal courts under the Administrative Procedure Act (APA), 5 USC 701(a)(2). Although courts have traditionally limited appeals of contracting decisions, we can anticipate an increasing number of cases as contracting out continues to receive government emphasis. Recent cases which discuss jurisdictional issues include:

National Federation of Federal Employees v. Cheney, 883 F. 2d 1038 (D.C. Cir. 1989), cert. denied, 496 US 936 (1990) - holding that federal employees and their representatives lacked standing to challenge the merits of a decision to contract out.

Diebold v. US, 947 F. 2d 787 (6th Cir. 1991), rehearing denied, 961 F. 2d 97 (1992) - holding that the contracting out decision in a wrongful privatization case is reviewable in a federal court under the Administrative Procedure Act. (Remanded for further proceedings including development of the facts and laws governing standing).

UNCLASSIFIED

AMCCC-PA POINT PAPER 8 January 1998

SUBJECT: Printing of Business Cards with Appropriated Funds

PURPOSE: Provide information about the current rules for printing business cards, and possible future policy changes.

FACTS:

Army policy, as articulated in Army Regulation 25-30, prohibits printing business cards using appropriated funds. Following direction from the Joint Committee on Printing in Congress, and consistent with long-standing Comptroller General opinions, the Army policy's only exceptions are business cards for military and ROTC recruiters, and contact cards for Army EOD units.

Recently, a Department of Justice (DOJ) Memorandum concluded that the purchase of business cards for agency employees who deal with outside organizations may be a proper expenditure from an agency's general appropriations. The DOJ Memorandum noted that while Comptroller General opinions are useful, they are not binding upon agencies in the executive branch. Thus, pursuant to the DOJ Memorandum, agency heads may determine whether the use of such cards would carry out the purpose of an appropriation.

It must be remembered that the Army policy set forth in AR 25-30 currently remains in effect, and must be followed, until such time as the policy is changed, or unless exceptions are granted on a case-by-case basis. AMC is now in the process of requesting that AR 25-30 be revised to allow the expenditure of appropriated funds for printing business cards for official purposes. In the meantime, Army Standards of Conduct Office (SOCO) guidance on the use of Government computers to print business cards may be helpful. SOCO has stated that such use of government resources is acceptable, when authorized by the appropriate supervisor, if the employee provides his or her own card stock, and if the purpose of the cards is to enhance the employee's job performance.

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UNCLASSIFIED

PROCUREMENT FRAUD: *QUI TAM* SUITS IN FEDERAL COURT

WHAT IS A QUI TAM SUIT?

Recently, the Army has endeavored, whenever possible, to alter the nature of the relationship between the Government and our contractors, shifting from the traditional adversarial relationship to more cooperative relationships. We generally refer to these new relationships as "*Partnering.*" Under the Partnering concept, we have endeavored to create Government-contractor teams which attempt to resolve contract issues before they become disputes, and foster an atmosphere of trust between the partners. Under such a relationship, contract problems are identified early in the process, and resolutions are sought at the lowest possible level. Unfortunately, there are some areas of the Government-contractor relationship where such an approach to contract administration cannot be applied. One of these is the situation where a third party brings a suit against the contractor. These are called *Qui Tam* suits. In a *Qui Tam* suit, an individual brings an action in Federal District Court, *on behalf of the United States.* Since these suits are commonly brought alleging some sort of fraud, waste or abuse, they are commonly referred to as "whistleblower" suits.

Qui Tam suits are authorized by statute in certain cases, such as fraud against the United States. The *Qui Tam* action dates back to the Civil War era, when there was rampant fraud by businesses supplying war materials to the Federal Government. The existing Federal law enforcement and judicial structures were not equipped to address the magnitude of the fraud problem that the Government faced. In an attempt to deal with this problem, Congress authorized individuals to bring legal suits against people who had defrauded the Government.

WHO BRINGS A QUI TAM SUIT?

While an individual might be motivated to bring a *Qui Tam* suit by a sense of civic duty, or a sense of indignation that the Government is being cheated, there are other, more tangible motivations for such a suit. First, such suits are often brought by a disgruntled contractor employee or former employee, who sees a *Qui Tam* suit as an avenue for airing grievances against the former employer. Such suits usually also include a suit for wrongful termination, unrelated to the alleged fraud. (It is noted that the Federal statute that authorizes such suits also authorizes courts to award damages to relators who were discharged *because* they brought such a suit.) The biggest reason, however, for bringing a *Qui Tam* suit is the potential for monetary reward. Persons bringing such suits, called relators, are entitled to percentages (usually between 15 and 25 percent) of any damages recovered by the Government as a result of the suit, as well as their costs and attorney fees.

HOW IS A QUI TAM SUIT DIFFERENT FROM ANY OTHER SUIT?

Once a *Qui Tam* suit is filed, procedures for handling that suit differ from a typical suit in several ways. The United States, in the person of the Department of Justice attorney assigned to the case, must make a determination as to whether the suit is of sufficient merit that the United States should "intervene" in the suit. If the Government intervenes, then the Department of Justice takes the lead in pursuing the suit and the relator's role is limited to providing support to the Department of Justice (usually in the form of testimony and other evidence) as necessary. In order to allow the Department of Justice sufficient time to examine the case and to make a reasoned determination as to whether intervention is appropriate, the *Qui Tam* procedures provide for the complaint that originated the suit to be placed "under seal" by the court for a period of 60 days. That means that the existence of the suit is kept secret, with knowledge of it restricted to the relator and those members of the Government necessary to evaluate the merits of the suit. The contractor

being sued is not informed of the suit against it while the case is under seal. It is imperative that Government employees respect the court's seal, as violating it could potentially result in charges of contempt of court being brought against the violator.

If the Government decides not to intervene, however, that does not end the suit. Relators may still pursue the suit independently, paying the costs of the litigation up front, and taking the risk of absorbing those costs should they lose. Relators found to have brought suits for frivolous, harassment or retaliatory purposes may also be assessed the attorney fees of the parties being sued. The motivation to the relator for continuing alone is a higher share of the recovery, which ranges between 25 and 30 percent.

There are some limitations to bringing a *Qui Tam* action. Members of the Armed Forces are barred from bringing such suits based on facts or knowledge arising out of their official duties. Civilian Government employees, while not barred from bringing such suits, face a variety of procedural and circumstantial hurdles before they may be considered proper *Qui Tam* relators. *Qui Tam* suits may not be based on information publicly disclosed, *unless* the relator was the original source of the Government or public information. What constitutes "publicly disclosed" is a complex analysis, and generally includes most instances where the Government was already aware of the fraud. In cases where there is public disclosure, the relator's share of the recovery is usually limited to around 10 percent. In cases where the relator turns out to be the person who planned or initiated the fraud against the Government, courts have substantially limited, or even eliminated the relator's share of the recovery.

Since the relator is a party to a *Qui Tam* suit, such suits cannot generally be settled by the Government without the relator's concurrence. In cases where the Government cannot get a relator to approve a settlement, it may be able to settle over the relator's objection if it can get the court to find that the settlement is "fair, adequate and reasonable", under all the circumstances. In cases

where the Government does not intervene in the *Qui Tam* suit, the Government must generally still approve any settlement between the relator and the defendant.

HOW DOES A QUI TAM SUIT AFFECT ME?

What does all this mean to the average Team C4IEWS employee? First, if you, as an employee are informed of the existence of a *Qui Tam* suit against a contractor, that fact MUST be kept extremely close hold. If you are being told of the suit by someone from outside Team C4IEWS (such as a United States Attorney, other official of the Department of Justice, or an agent of a criminal investigative agency) you should inquire if the CECOM Legal Office is aware of the suit. If not, then ask the official if you can inform the Legal Office of the existence of the suit, or if they will be doing so. Under no circumstances should you inform anyone else of the suit unless given permission. You risk possible contempt of court charges if you violate the court's order sealing the suit. If you need to inform someone of the suit in order to obtain information necessary to support the investigation, get permission first.

Second, you need to realize that, perhaps more so than in other litigation, cooperation in the initial stages of a *Qui Tam* suit will need to be provided expeditiously. The Government has 60 days in which to assess the validity of the suit and determine if intervention is warranted. Because of the nature of Team C4IEWS' business, this often requires the assessment of a great deal of technical information by the Department of Justice, often involving evaluations by Government technical experts. While the Government can request an extension of the 60 day period for making its intervention determination, courts vary on how much time they are willing to allow.

WHO IS RESPONSIBLE FOR QUI TAM SUITS AT TEAM C4IEWS?

Coordination of *Qui Tam* suits with the Department of Justice, along with all other cases of contract fraud, is the responsibility of the CECOM Procurement Fraud Advisor (PFA), within the CECOM Legal Office. Currently, the PFA is John H. Eckhardt, who can be reached at x29833.

Kathryn T. H. Szymanski

OFFICIAL CORRESPONDENCE

ASSISTANT DEPUTY CHIEF OF STAFF FOR RESEARCH, DEVELOPMENT AND ACQUISITION - ACQUISITION, CONTRACTING AND PRODUCTION MANAGEMENT (AMCRDA-A)

AMC Policy in Support of the Rights and Responsibilities of Certifying Officials:

1. References:

a. Memorandum, Under Secretary of Defense (USD), Subject: Purchase Card Reengineering Implementation Memorandum #1: Certifying Officer Guidance, 17 Oct, 1996.

b. Memorandum, SARD-PI, Subject: Purchase Card Reengineering Implementation Memorandum #1: Certifying Officer Guidance, 3 Apr 1997.

2. IMPAC certifying officials have the following rights and responsibilities concerning liability for amounts certified on IMPAC bank statements for payment:

a. Under the DOD and SARDA procedures referenced above, approving officials may be appointed as certifying officials IAW the procedures and qualifications found in DOD 7000.14-R, Vol 5, chapter 2, paragraph 0212. Certifying official's liability is "strict and automatic" and they are assumed to be liable until they can prove otherwise (under DoD Financial Mgmt. Reg. Vol 5, Appendix C, paragraphs C103-C108; and 31 USC 3527(b). This means that these individuals are pecuniarily liable for the costs of any purchases they certify for payment which may later be determined improper or illegal. DoD Financial Management Regulation, Volume 5, Appendix C, paragraphs C104 indicates that certifying officials are insurers of the public funds in their custody and are excusable only for losses due to acts of God or the public enemy.

b. Certifying officials are, however, able to seek relief from Defense Finance and Accounting Service (DFAS) or the Comptroller General, per the same DoD Financial Regulation and law, so long as the payment is based on official records and the official could NOT have been reasonably expected to discover the correct information or the payment was made in good faith, was not

prohibited by law and the Government received value for the payment. In addition, diligent collection actions must be taken for relief to be granted. Certifying officials should be assured by their agency that they may seek relief.

c. Certifying officials have the responsibility to know the policy concerning what is prohibited from IMPAC purchase and what is allowable for purchase. This includes but is not limited to Army Federal Acquisition Regulation Supplement 13.90, the General Services Administration Governmentwide Commercial Credit Card Service Contract Guide, the Standard Army Business Practices, HQ, DA and HQ, AMC developed policies and internal agency procedures. Ignorance of the policy is not an acceptable excuse for avoiding "pecuniary liability".

d. Certifying Officials have the right to participate in any audit or investigation of purchases for which they have certified payment.

e. Certifying Officials have the right to request relief from liability from DFAS or the Comptroller General, depending upon the characterization of the loss.

Note: The specific requirements for requests for relief are covered in Section 0610, Chapter 06, DOD Financial Management Regulation, Volume 5, Disbursing Policy and Procedures, May 1996. Paragraph 061002, states, in part, "The memorandum requesting relief shall be addressed to Office of the General Counsel, U.S. General Accounting Office, 441 G Street, NW, Washington, DC 20548. The request shall be routed through the requestor's chain of command and the servicing DFAS Center. Generally, the accountable individual should submit the request for relief within 30 days after all required investigative and/or, when appropriate, the Disbursing Officer's (DO's) required collection efforts have been completed and the loss has been referred to the servicing DFAS Center for further collection action. If an investigating officer has been or will be appointed as prescribed in Section 0607 above, a copy of "the investigating officer's report shall be included as an attachment to the request for relief."

f. Certifying Officials have the right to require that cardholders under their jurisdiction obtain the certifying official's approval prior to making any purchase. This requirement should be put in writing. A certifying official, who is not a supervisor, may recommend to the cardholder's supervisor

that disciplinary action be taken against the cardholder if s/he fails to follow the certifying official's requirement.

e. Certifying officials have the right (and the duty) to seek guidance from IMPAC program administrators, the legal office and others before making a purchase if they have any doubt about propriety.

3. It is recommended that a copy of this policy be provided to each previously appointed certifying official and cardholder as soon as possible. Also, a copy of this policy shall be included with each appointment letter to new certifying officials and cardholders. HQ, AMC supports maximizing purchase card use in accordance with the law, General Services Administration, Department of Defense and Department of Army procedures. Certifying officials are hereby advised of the seriousness of their responsibility and encouraged to act with prudent care.

CONTRACTOR LIABILITY USING PERFORMANCE REQUIREMENTS

With the current shift from manufacturing to design specifications to manufacturing to performance specifications, the contracting community is asking the question whether contractors bear an increased liability risk. Probably. Some argue that, by their very nature, performance specifications shift greater risk from the government to the contractor. For example, performance specifications may threaten the availability of the so-called "Government Contractor Defense" to tort liability, thus leaving contractors more vulnerable to product liability suits.

Under the "Discretionary Function" exclusion to the Federal Tort Claims Act (FTCA), the federal Government cannot be sued for the negligent acts of government employees when those acts involve policy judgments and decisions in which there was a weighing of competing concerns. Thus, for example, where the military is aware of a safety hazard but decides to accept a residual risk because of a performance trade-off, courts have refused to second-guess that discretionary decision-making process. Ordinarily, this exclusion from liability would leave the contractor as the sole target of a lawsuit, but under certain conditions the "Government Contractor Defense" protects the contractor who shared in the Government's discretionary decision-making. In Boyle v. United Technologies the Supreme Court outlined the elements of the defense as follows: (1) the Government approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the Government about the dangers in the use of the equipment that were known to the supplier but not to the Government. (108 S.Ct. 2510, 1988.) Subsequent decisions have further elucidated the exception and the conditions for its application.

In order for a contractor to be shielded from liability for its negligence, the Government must exercise the discretion, not the contractor. In Trevino v. General Dynamics Corp., the court held that the defense "protects government contractors from liability for defective designs if discretion over the design feature in question was exercised by the government...mere government acceptance of the contractor's work does not resuscitate the defense unless there is approval based on substantive review and evaluation of the contractor's choices." (865 F.2nd 1474, 5th Cir. 1989.) In other words, Government approval must have involved more than a mere "rubber stamp." In Kleeman v. McDonnell Douglas Corp., the court noted that it is extensive government involvement in the design process which "provides tangible evidence of the strong federal interest which justifies the creation of a federal common law defense for government contractors in the first place." (890 F.2d 698 (4th Cir. 1989.) The defense applied, then, where "the government maintained discretion over the design of the product throughout; it did not simply turn over such discretion, and the military decisions therein, to the private contractor." (Id.)

The above cases reflect that, for the government contractor defense to apply, there must be an interchange between the contractor and the Government. However, whether deleting design specifications effectively eliminates the Boyle defense is a controversial issue not yet fully addressed by the courts. Experts differ on the potential liability increase. Pentagon acquisition reform chief Colleen Preston didn't believe this issue would have a substantial impact. (See Is a

Risky Business Getting Riskier?, Defense Week, May 15, 1995.) She argued that in most cases companies were liable and Boyle didn't apply; "The only time companies were left off the hook is when they were clearly forced to do something that they believed to be inherently unsafe." (Id.)

Conversely, Herbert Fenster, (a partner in the Washington, D.C. law firm McKenna & Cuneo and a legal representative for General Dynamics) argues that the specification changes will not eliminate the Boyle defense because it is used so often. (Id.) Fenster believes that Boyle will still protect "government unique" products. He maintains that a company's argument that its product is government-unique will rely on two factors; the degree of Government involvement in design plans and the degree to which the final product appears and functions differently from any commercial product. Thus, he says, the specifications shift may make a difference, but only on the margins, with core weapons systems not significantly affected. Where the contractor translates performance requirements into design specifications, the Government will still be signing off on them. According to this argument, switching to performance specifications will be a "distinction without a difference," since contractors will still submit blueprints for approval. (Id.)

However, F. Barry Hennegan, general counsel for Lockheed Martin Astronautics Space Systems, said his company would be wary of performance and commercial specifications and standards, which, he said, introduce "a new element of risk into an already risky business." (Id.) Colleen Preston replied that she could "see his point that it is safer to go with the tried-and-true product than it is to develop a new product. But it's done all the time. What do the airlines do when they develop an aircraft?" She argued that "the only time they are going to be liable is if they have a defective design. That's why you do testing and all that. Is it going to cost the government money? Yes, because the company is obviously assuming a risk to develop the new product that they wouldn't have if they were selling us the old product." Preston also maintained that military contractors should be accountable for the design of their products in the same way the commercial sector is; "By us getting away from detailed specs, [contractors] will be under normal rules of having to produce product that meets certain standards…The industry wants to be treated as if they are commercial manufacturers…They ought to be working with the same standards that commercial manufacturers are." (Id.)

What does all this mean for our defense contractors? Ultimately the courts will have the final say. I have discussed this issue extensively with attorneys within the Army Materiel Command. Basically, we are in a holding pattern waiting for the first cases to test the waters. Some attorneys believe that contractors might soon be including the element of product liability risk in their cost proposals, but thus far contractors seem to believe they are still immune to this risk.

An inherent factor in the shift to performance specifications is that contractors may be more vulnerable to product liability claims; that may well be one of the factors driving the change. As evidenced in the above remarks of Deputy Undersecretary of Defense for Acquisition Colleen Preston, the Government does not have any obligation or responsibility to negate that risk or its

impact. Military contractors should be accountable for the design of their products in the same manner and degree in which the commercial sector is.

Sandy Biermann
Attorney/Advisor

Visit of

MG John Altenburg, The Assistant Judge Advocate General
BG Michael Marchand, Assistant Judge Advocate General for Civil Law & Litigation
Mr. Robert Kittel, Chief Regulatory Law Office
COL Richard Rosen, Chief, Personnel Plans & Training Office
LTC Janet Charvat, Office of The Judge Advocate General

To

Office of the Command Counsel
Headquarters, U.S. Army Materiel Command

14 January 1998

Time	**Activity**	**Location**
0900	**MG Altenburg** and party arrive. **MAJ Mabry** will escort to conference room.	HQAMC Lobby
0905	**Mr. Korte** – Greetings and Introductions	Conference Room 10N09
0910	AMC Command Briefing - Tape	Same
0930	Courtesy call with **MG Link**	10E20
0945	Briefings begin	10N09
0945-0950	**Mr. Femino** - *Inherently Governmental Functions*	Same
0950-1005	**COL Adams** - *General Law Overview* - *Impact of QDR on JAGC Assignments within AMC* - *Civilian Deployment Issues*	Same
1005-1010	**Mr. Lingo** - *AMC FOST/FOSL Program*	Same
1010-1015	**Mr. Citron** - *AMC Environmental Partnering Program*	Same
1015-1030	**Mr. Klatsky** - *Alternative Disputes Resolution* - *AMC Partnering Program* - *AMC Command Counsel Home Page* - *AMC Command Counsel Newsletter*	Same
1030-1040	**Ms. Buchanan** - *Business Law Overview* - *Privatization/National Guard*	Same
1040-1045	**Ms. Travers** - *Procurement Fraud*	Same

1045-1050	**LTC Hoburg** *- Rocky Mountain Arsenal Program Management Contract*	Same
1050-1055	**MAJ Mabry** *- AMC Center of Military History Project Office*	Same
1055-1105	**Mr. Hodge** *- Protest Litigation Overview* *- AMC-Level Protest Program*	Same
1105-1120	**Mr. Medsger** *- Intellectual Property Overview* *- DA Intellectual Property Law Program* *- Colt Licensing Claim* *- Skypeck Copyright Infringement Claim* *- Patent License Royalties*	Same
1120-1130	Closing Remarks	Same
1130-1245	No-host Lunch (OTJAG Visitors, AMC Chiefs/Military Personnel)	Bombay Bicycle Club
1245	**MG Altenburg**, **Mr. Kittel**, and **COL Rosen** depart.	Same
1300	**BG Marchand** and **LTC Charvat** arrive back at AMC	HQAMC – Office of Counsel
1305	**BG Marchand** meets with **Mr. Korte**	7E06
1315	**BG Marchand** meets individually with Military Attorneys	Respective Offices
1315-1330	**LTC Hoburg**	
1330-1345	**MAJ Mabry**	
1345-1400	**MAJ Stump**	
1400-1430	**COL Adams**	
1430-1500	**BG Marchand** and **LTC Charvat** tour Command-Logistics Operations Center (C-LOC) **Mr. Ostin** **COL Adams** **Mr. Anderson**	G2C60
1500	**BG Marchand** departs	

To the Chain of Command:

The Secretary of the Army Senior Review Panel conducted one of the most extensive reviews of the human relations climate our Army has ever done. The Senior Review Panel report identified problems with the Army's Equal Opportunity program and made recommendations about Equal Opportunity Advisors (EOAs). The Army's senior leaders have already taken actions to improve the program. Some are:

. Centrally manage and select EOAs
. Demographically align EOAs with the population of the US Army to eliminate the perception that the program is run by women and minorities for women and minorities
. Enforce EOA selection criteria to ensure only the best-qualified, highly-competitive soldiers are chosen as EOAs
. Require MACOMs to report to PERSCOM when EOAs no longer meet established criteria (e.g. if they are no longer deployable or able to meet height/weight standards, etc.)
. Increase Army population of EOAs to 500 to ensure that all brigade and brigade-equivalent commanders have an EOA assigned to their units
. Increase EOA officer rank structure at division, brigade and corps level to affect better coordination between EOA and commander
. Establish timelines for EO complaint appeals
. Develop a new command climate assessment tool to enable commanders to better determine their unit's climate of command and identify weak areas that need fixing or extra attention

Commanders have a very important role to play in making the EOAs more effective and efficient. The Army provides EOAs as a resource to help manage the Equal Opportunity program in units. Effective use of EOAs means they must have access to the to you. EOAs are "eyes and ears" for the command but if they can't tell what they see and hear, commanders are wasting a valuable resource. Your EOAs then become "eyes and ears" without a voice. Open your door to them. Give them a viable speaking part during staff meetings. Have them work closely with the CSM and the Chaplain so they may share their perceptions of the command climate.

Set clear goals and objectives for the EO program and ensure that your guidance is known throughout the command. The EO program and the EOA need to have visibility in the unit. By increasing their visibility, you demonstrate commitment to the EO program and to the EOA's support of your program.

The Consideration of Others program will provide us a mechanism to ensure that the human dimension of warfare is not forgotten in our quest for combat readiness. The Equal Opportunity Advisor (EOA) is key to the successful

implementation of the Consideration of Others program.

The Army has already initiated a comprehensive training program to ensure that all EOAs are prepared to provide invaluable expertise to you in executing the Consideration of Others program. In December, the Army conducted initial training for 160 EOAs on the concept of the program, facilitation skills, their role in executing the program, how they can assist you in developing a viable program and the importance of the human dimension of warfare. The program of instruction at the Defense Equal Opportunity Management (DEOMI) Institute is being modified to ensure that all EOA selectees receive two days of training on Consideration of Others. This formal training, combined with the rest of the DEOMI curriculum, will ensure that your EOA is a subject matter expert on the Consideration of Others program and is fully prepared to provide guidance to you for the successful execution of your program.

Human relations is a very important part of combat readiness. The EOA is a readiness multiplier. Through proper support, utilization and recognition of the EOA, you can positively affect the human relations climate in your unit.

Soldiers are our credentials.

DENNIS J. REIMER
General, GS
Chief of Staff

OVERVIEW OF CIVILIAN PERSONNEL PROVISIONS IN NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 1998

Depot Level Activities.
Section 357. Amends 10 U.S.C. 2466(a) to increase from 40 percent to 50 percent the share of depot level maintenance and repair workload that may be performed by the private sector.

Section 360. Prohibits the management of depot-level maintenance and repair employees by any constraint or limitation in terms of man years, end strength, full-time equivalent positions, or maximum number of employees.

Section 361. Requires the Secretary of Defense to designate each depot-level activity (excluding certain facilities identified for closure or major realignment under BRAC) as a Center of Industrial and Technical Excellence in the core competency of the activity. Requires the Secretary of Defense to establish a policy encouraging military department secretaries and Defense Agency heads to reengineer industrial processes and adopt best-business practices at their depot activities in connection with their core competency requirements. Allows Centers to enter into public-private partnerships.

Section 364. Prohibits the Secretary of the Army from initiating reductions-in-force of civilian employees at the five Army depots participating in the demonstration and testing of the Army Workload and Performance System (AWPS) until after the Secretary submits to Congress a report certifying that AWPS is fully operational. Does not apply to BRAC 95 reductions at Red River and Letterkenny Army Depots.

Section 522. Military technicians (dual status). Amends 10 U.S.C. 10216. Defines a "military technician (dual status)" as a federal civilian employee who is employed in accordance with Titles 5 or 32 and who, as a condition of federal civilian employment, must maintain military membership in the Selected Reserve, and who is assigned to a position as a technician in the administration and training of the Selected Reserve or in the maintenance and repair of supplies or equipment issued to the Selected Reserve or armed forces. Requires (unless exempted by law) all military technicians hired after 1 December 1995 to maintain military membership in the Selected Reserve unit by which they are employed as a military technician, or in a unit they are employed as a military technician to support. Prohibits use of appropriated funds to compensate any military technician hired after 10 February 1996 who is no longer a member of the Selected Reserve. This prohibition on the use of funds does not apply for a period of not more than 6 months following an individual's loss of Selected Reserve membership if the

Secretary determines that the loss of membership was not due to the individual's failure to meet military standards. Requires the Secretary of Defense to submit to Congress a legislative proposal (developed in consultation with OPM) to provide statutory authority and clarification under Title 5 for hiring, management, promotion, separation and retirement of reserve military technicians. Eliminates the skill compatibility requirement between a military technician's civilian and military positions.

Section 523. Non-dual status military technicians. Amends Title 10 to add section 10217. Defines "non-dual status military technician" as a DoD civilian employee serving in a military technician position who was hired as a military technician before 18 November 1997 and as of 18 November 1997 is not a member of the Selected Reserve or after such date ceased to be a member of the Selected Reserve. Sets a cap on the number of non-dual status technicians in each component as of 30 September 1998. Requires DoD to report, within 90 days of enactment, the actual number of non-dual status technicians in each component, and to submit, within 180 days of enactment, a plan to ensure that by the end of FY 2007 and thereafter all military technician positions are occupied only by military technicians (dual status). In developing the plan, the Secretary must consider the feasibility and cost of certain actions including contracting with the private sector for performance of military technician functions.

Section 524. Report on feasibility and desirability of conversion of AGR personnel to military technicians (dual status). Requires that DoD report to Congress on the feasibility and desirability of converting AGR personnel to dual status military technicians.

Section 591. Sexual harassment investigations and reports. Amends Title 10 to add section 1561. 10 U.S.C. section 1561 obligates commanders to take certain actions upon receipt of a complaint from a member of the command or a ***civilian employee*** under the commander's supervision that alleges sexual harassment by a member of the armed forces or a DoD ***civilian employee***. 10 U.S.C. section 1561 includes a definition of sexual harassment similar (<u>but not identical</u>) to the definition in DODD 1350.2 and AR 600-20. This new statutory definition is broader than the Title VII definition of sexual harassment. It covers condonation by persons in supervisory positions and deliberate or repeated unwelcome gestures or comments of a sexual nature in the workplace by any member of the armed forces or DoD civilian employee, whether or not such activity creates a hostile work environment or adversely affects the victim's ability to perform his or her job.

Section 593. Authority for personnel to participate in management of certain non-Federal entities. Authorizes service secretaries to approve on a case-by-case basis the limited service of military and civilian personnel without compensation as directors, trustees, or officers of a military welfare society, such as Army Emergency Relief, or other designated not-for-profit entities.

Section 911. Personnel reduction in management headquarters and headquarters support activities . Amends Title 10 to add section 130a. 10 U.S.C. section 130a requires a 25 percent reduction in the number of personnel assigned to management headquarters and headquarters support activities phased in over five years. 10 U.S.C. section 130a also requires a 5 percent reduction by October 1998 of personnel assigned to management headquarters activities and management headquarters support activities in the U.S. Transportation Command.

Section 912. Defense acquisition workforce. Requires a reduction of 25,000 in the number of defense acquisition positions in FY 1998. The Secretary of Defense is authorized to waive up to 15,000 of that number if the Secretary determines and certifies to Congress that a greater reduction would be inconsistent with cost-effective management and would adversely affect military readiness. Requires a report on the reductions in the defense acquisition workforce since FY 1989 and a definition of “defense acquisition workforce” that can be uniformly applied throughout DoD. Requires a review of acquisition organizations and functions by the Secretary of Defense and the Task Force on Defense Reform.

Section 1101. Use of prohibited constraints to manage DoD personnel. Requires the secretary of each military department and head of each defense agency to submit an annual report on the management of their civilian workforce to the Senate Armed Services Committee and the House National Security Committee. The reports must include a certification that the civilian workforce is not and has not during the preceding twelve months been subject to a constraint or limitation in terms of man years, end strength, full-time equivalent positions, or maximum number of employees.

Section 1102. Veterans’ preference status for certain veterans who served on active duty during the Persian Gulf War. Amends the Title 5 definition of “veteran” for purposes of preference eligible status to include military personnel who served on active duty during the period from
2 August 1990 to 2 January 1992.

Section 1103. Repeal of deadline for placement consideration of involuntarily separated military reserve technicians. Amends 5 U.S.C. 3329 to eliminate the time limitation within which involuntarily separated military reserve technicians are given priority placement consideration.

Section 1104. Rate of pay of DoD overseas teachers upon transfer to General Schedule position. Amends Title 5 to authorize DoD to regulate the amount of salary increase for certain overseas professional educators who move from positions compensated under the Teaching Position (TP) pay system to positions compensated under the General Schedule (GS) pay system.

Section 1105. Garnishment and involuntary allotment. Amends 5 U.S.C. 5520a to restore the requirement that administrative costs in executing a garnishment action be borne by the federal employee.

Section 1106. Extension and revision of voluntary separation incentive pay (VSIP) authority. Amends 5 U.S.C. 5597 to extend authority for the DoD VSIP Program until 30 September 2001. For separations occurring on or after 1 October 1997, increases the agency's retirement fund contribution to an amount equal to 15 percent of the VSIP recipient's final basic pay.

Section 1107. Use of approved fire-safe accommodations by Government employees on official business. Amends 5 U.S.C. 5707a to require each government agency to ensure that not less than 90 percent of the commercial lodging-room nights for its employees each FY are booked at approved accommodations and that each agency establish procedures to meet this requirement. Requires the Federal Emergency Management Agency to prepare an accurate fire-safe hotel list. Requires the General Services Administration to submit an implementation report.

Section 1108. Navy higher education pilot program. Authorizes the Navy to establish a pilot program of graduate level higher education regarding the administration of business relationships between the Govemment and the private sector, to be made available to employees at certain Navy commands and activities.

January 9, 1998

SAMR-SFECR

MEMORANDUM FOR ALL EEO OFFICERS

SUBJECT: Union Representation in the Equal Employment Opportunity (EEO) Complaint Process

1. In accordance with 29 Code of Federal Regulation (CFR) Part 1614 and Department of Army (DA) regulation (AR) 690-600, every complainant has a right to be accompanied, represented, and advised by a representative of his/her choice. Union officials or union members may likewise be designated by a complainant to serve as personal representatives in the processing of a discrimination complaint. It is necessary for the EEO officer in consultation with the Army legal representative and Civilian Personnel official to determine whether conflict of interest issues exist. In cases where representation of a complainant would conflict, or create the appearance of a conflict, with the official or collateral duties of the representative, the representative may be disqualified. For example, a Union president may not represent a supervisor if he/she supervises a person who encumbers a position in the bargaining unit. In this circumstance the Union president may be disqualified due to conflict of interest.

2. Any decision to disqualify a representative rest with the activity commander or his/her designee who will be promptly advised of conflict of interest issues. If a personal representative is disqualified for representation, the activity EEO officer will address the denial in a letter to the complainant. The letter must advise complainant of his/her right to appeal to EEOCCRA, ATTN: SAMR-SFECR, Arlington, Virginia 22202-4508. If an Equal Employment Opportunity Commission (EEOC) administrative judge disqualifies a representative during a hearing, the decision cannot be appealed.

3. Time used by a union official or union member in representation of the complainant in administrative EEO complaint process cited in 29 CFR Part 1614 is not to be considered nor computed as “official time” within the confines of “official time” as stated in 5 USC Section 7131 unless a negotiated labor-management agreement includes EEO representation as official time under section 7131. Otherwise, time used by a union official or union member in serving as personal representative for a complainant during EEO complaint processing is no different than that of a non-union member. The time used by

a complainant or his/her representative to prepare the complaint and respond to DA and EEOC requests for information is called “official time” in accordance with 29 CFR Section 1614.605.

4. While on duty and otherwise in a pay status, a reasonable amount of official time, as defined in EEOC’s EEO Management Directive 110, is permitted by a management official. The actual number of hours to which complainant and his/her representative are entitled will vary, depending on the nature and complexity of the complaint and considering the agency’s mission and the agency’s need to have its employees available to perform their normal duties on a regular basis. Complainant, his/her personal representative, and the activity should arrive at a mutual understanding as to the amount of official time to be used prior to the complainant’s use of such time.

5. When a union attorney represents a complainant and the complaint is settled or there is a finding of discrimination (except in age discrimination and equal pay complaints), the attorney is entitled to payment of attorney’s fees as would be the case if the complainant’s attorney representative was not a union attorney. However, under the provisions of 29 CFR Section 1614.501(e), no award of attorney’s fees is allowable for the services of any employee of the federal government.

6. The preceding guidance applies only to matters in the administrative process. There is no right to official/administrative time to file a suit in court. The above guidance is also subject to any conditions agreed upon in a negotiated labor-management agreement.

Stanley L. Kelley, Jr.,
Director, Equal Employment Opportunity
Compliance and Complaints Review Agency

Recent Changes to the Safe Drinking Water Act (SDWA) Relevant to the Day-to-Day Operations Of DoD Facilities

SUBJECT {SECTION}	AMENDMENT	REI
Selecting New Contaminants for Regulation {1412(b)}	Instead of regulating 25 contaminants every three years, EPA will publish a list of contaminants based on adverse health effects, occurrence or substantial likelihood of occurrence of a contaminant in public water systems and whether there is a meaningful opportunity for health risk reduction for persons served by the system. Within five years, EPA will decide whether or not to regulate at least five of the contaminants.	May impact futu monitoring and n requirements.
Urgent Threats To Public Health {1412(b)}	EPA may bypass the requirements of the contaminant selection process and the cost/benefit justification analysis, if, consultation with Health & Human Services, determines a contaminant poses an urgent threat to public health.	EPA may expedi contaminants, ba public health. M and/or system m
Disinfectants and Disinfection Byproducts {1412(b)}	EPA is required to finalize these rules in accordance with the schedule set forth in 59 FR 6361. This schedule currently requires promulgation of a disinfection rule by November, 1998.	New rules may re monitoring, and t
Emergency Powers{1431}	Fines, for failure to comply with an action imposed by the Administrator, are increased from $5,000 to $15,000 per day for each day the violation occurs or failure to comply continues.	Installations are section 1414). If substantive or pr could lead to fin violation
Federal Agencies {1447}	Contains an expanded waiver of sovereign immunity for federal agencies with regard to all federal, state, and local requirements, including fines and penalties. Provides EPA with authority to issue an administrative penalty order, not to exceed $25,000 per day per violation, if a federal agency has violated an applicable requirement of this title.	Effective 6 Augu punitive and coer up to $25,000 pe employees are n (including fines a
Citizen Civil Action {1449}	After giving notice, a citizen may bring an action for the collection of a penalty against a federal agency that fails to pay a penalty 18 months after the effective date of the final order.	Prior to 1996 am under the SDWA Federal agencies

		fines and penalti

Recent Changes to the Safe Drinking Water Act (SDWA) Relevant to the Day-to-Day Operations Of DoD Facilities

Considerations of Cost and Benefits {1412}	EPA must publish a determination on whether the standard they are proposing is justified by the cost.	None at this time
Judicial Review of Cost/Benefit Justification Determination {1412}	If EPA uses the cost/benefit justification analysis to set a standard, it can only be challenged in court on the basis that the determination is arbitrary and capricious.	None at this time
Risk Trade-Off {1412(b)(5)}	EPA may establish a Maximum Contaminant Level (MCL) at a level other than the feasible level based on a balancing of risks.	None at this time
Discretionary Standard Setting Authority {1412(b)(6)}	EPA may set a standard that maximizes health and risk reduction benefits at a cost that is justified by the benefits.	None at this time
Review and Revision of Regulations{1412}	EPA is given more time to conduct a review of promulgated regulations.	None at this time
Sulfate {1412(b)}	EPA is required to evaluate sulfate.	None at this time
Arsenic {1412(b)}	EPA is required to promulgate arsenic rules (by Jan 2001).	None at this time
Radon {1412(b)}	EPA must withdraw any national primary drinking water regulation for radon, and promulgate a regulation under the provisions contained in the 1996 Amendments.	None at this time
Filtration Requirements {1412(B)(7)(C)}	States may establish on a case-by-case basis alternatives to filtration requirements in certain watersheds depending on the quality of the source water.	None at this time
Ground Water Disinfection, Disinfectant and Disinfection Byproducts {1412(b)(8)}	Requires EPA to promulgate regulations requiring disinfection of surface water systems and provides EPA the flexibility to determine which ground water systems must disinfect.	May impact samp requirements.
Effective Date for Regulations {1412(b)(10)}	Water suppliers may receive more time (up to two years) to come into compliance with new national primary drinking water regulations, when promulgated.	It may be possibl more time to con assume EPA or t for additional tim

Recent Changes to the Safe Drinking Water Act (SDWA) Relevant to the Day-to-Day Operations Of DoD Facilities

State Primacy and State Adoption of Regulations {1413}	States are given more time to adopt EPA regulations.	None at this time.
Public Notification - Violations with Potential to Have Serious Adverse Effects on Human Health {1414(c)}	EPA and the States must amend their notification regulations in order to require notification within 24 hours of violations with potential to have a "serious adverse effect."	When promulgated installations with l violations with pot
Consumer Confidence Reports {1414(c)}	Community water systems must prepare annual reports on drinking water which include: (1) information on its source; (2) brief definitions of terms; (3) maximum contaminant level goals (MCLGs); (4) maximum contaminant levels (MCLs); (5)level of contaminant found; (6) information on health effects if the MCL is violated; and (7) information on levels of unregulated contaminants, if required by EPA regulations.	Installations will b Consumer Confide
Significant Noncompliance Reports {1420}	States must provide, and periodically update, reports to EPA on systems with a history of significant noncompliance with SDWA regulations.	States may ask inst information regardi
Exemptions {1416}	EPA or states may give three additional years to comply, if the system requires capital improvements and it is in the process of obtaining funds or will join a regional public water system.	May benefit install perform capital im water supplies, or
Lead Pipes and Plumbing {1417}	Prohibits all use of lead plumbing, including fixtures (residential and nonresidential).	Installations must u replacing plumbing
Capacity Development {1420} ****	States have authority to ensure new systems created after 1 October 99 demonstrate technical, managerial, and financial capacity.	None at this time.
Operator Certification {1420}	EPA must publish guidance specifying minimum standards for certification of operators. States will implement the operator certification programs.	Minimal, DOD po comply with alread certification require

Recent Changes to the Safe Drinking Water Act (SDWA) Relevant to the Day-to-Day Operations Of DoD Facilities

Source Water Quality Protection {1453}	States must carry out source water assessment programs that delineate boundaries of source water and identify origins of contaminants and susceptibility of water systems to contaminants.	Installations s programs and
Information Gathering {1445}	EPA is no longer required to go through the rulemaking process to obtain information.	Installations n information to systems.
Interim Monitoring Relief {1418}	For systems serving less than 10,000 people, a primacy state may modify monitoring requirements for regulated or unregulated contaminants, disinfectants and disinfection byproducts, or corrosion byproducts for an interim period, if monitoring has shown that the contaminant is absent from the system.	May benefit in recurring con
Permanent Monitoring Relief {1418}	Primacy states having an approved source water assessment program may adopt tailored alternative monitoring requirements.	In appropriate monitoring rec
Unregulated Contaminants Monitoring {1445}	EPA must promulgate regulations establishing the criteria for a monitoring program for unregulated contaminants. It also sets a maximum level of unregulated contaminants (30) that EPA may require a public water system to monitor.	Installations n additional con
Occurrence Data Base {1445}	EPA must assemble and maintain a national drinking water occurrence data base on regulated and unregulated contaminants.	Installations n information on database.
Recycling Filter Backwash {1412}	EPA must promulgate a national primary drinking water regulation to govern recycling of filter backwash water within the treatment process.	None at this ti
Water Conservation Programs {1455}	EPA must publish guidelines for water conservation plans for public water systems.	None at this ti
Waterborne Disease Occurrence Study {1458}	EPA and CDC must jointly establish pilot waterborne disease occurrence studies.	None at this ti
Estrogenic Substances Screening Program {1457}	EPA may provide for testing of any other substances that may be found in drinking water if the agency determines that a substantial	None at this ti

	population may be exposed to such substances.	

DAIM-FDF-U Revised: 25 Nov 97

DEPARTMENT OF THE ARMY
ASSISTANT CHIEF OF STAFF FOR INSTALLATION MANAGEMENT

POLICIES AND PROCEDURES FOR PRIVATIZATION OF ARMY OWNED UTILITY SYSTEMS AT ACTIVE INSTALLATIONS

1. PURPOSE: This updates the Army policy (Reference 2.a. through 2.d.) for privatization of installation utility services at active installations; defines the roles of the ASA(IL&E); Headquarters, Department of the Army; the U.S. Army Corps of Engineers (USACE); the Major Commands (MACOMs); and the Installations; and directs the formulation of plans, schedule and milestones for implementing this policy. This policy does not apply to utility systems at installations closing under BRAC.

2. REFERENCES:

a. Chief of Staff, Army Memorandum, Privatization of Army-Owned Utility Systems, 1 May 1997

b. HQDA, ACSIM (DAIM-FDF-U) Memorandum, Subject: Privatization of Natural Gas Service and Abandonment of Existing Systems, 29 April, 1997

c. AR 420-49, Facilities Engineering, Utility Services, 28 April, 1997

d. HQDA, OACSIM (DAIM-FDF-U) Memorandum, Privatization of Army Owned Utility Systems, 17 March 1995

e. HQUSACE, CERE-MM Memorandum, Revised Guidance - Privatization/Disposal of Utility Systems at Active Military Installations, 10 October 1997

f. Office of Management and Budget Circular No. A-76, Revised Supplemental Handbook, Performance of Commercial Activities, March 1996

g. AR 11-18, The Cost and Economic Analysis Program, 31 January 1995

3. OVERVIEW:

a. Army Utilities Strategy: The Army Strategy to provide reliable, cost effective and efficient utility services to installation customers has three components: (1) Utilities Privatization; (2) Utilities Modernization, which focuses on centrally-funding the upgrade and renovation of utility systems that have a low prospect of being privatized; and (3) Improved Preventive Maintenance.

b. Utilities Privatization: Installation utilities systems and services shall: (1) support vital installation missions, (2) be reliable, (3) be resource efficient, and (4) leverage technology. The Army policy is to obtain utility services from the most efficient private/public sector providers. This may be accomplished through a transfer of the installation utility infrastructure to a private/public sector organization that takes over the responsibility to own, maintain, repair and eventually dispose and replace the utility systems to meet current and future requirements of the Army installations. The organization acquiring ownership of the distribution system may, or may not be, a separate entity from the supplier of the commodity, such as electricity, natural gas, treated potable water or wastewater treatment and disposal services. The Army has determined that privatization of utility systems is the most cost effective way of obtaining these services for the installations.

c. Army Privatization Goals: The Army goal is to:

Privatize 100 percent of electrical, water, wastewater, and natural gas systems by 1 January 2000, except those needed for unique security reasons or when privatization is uneconomical.

4. RESPONSIBILITIES:

a. Office of the Assistant Secretary of the Army (Installations, Logistics and Environment) (ASAILE): provides program policy direction, coordinates Secretariat and Office of the Secretary of Defense approval for requests for legislation to transfer utility systems with underlying land, and approves requests to transfer utility systems without underlying land.

b. Office of the Assistant Chief of Staff for Installation Management (OACSIM): is the Army Staff proponent for the program. OACSIM develops and implements Army policy; coordinates with other ARSTAF elements and agencies to facilitate the process; ensures programming adjustments in the installation utility accounts for operations, maintenance, and repair due to privatization; reviews study results and provides guidance to MACOMs and USACPW for privatization actions at installations. OACSIM approves MACOM concurrence to categorize an installation utility system as being "Uneconomical to privatize" or "No potential to privatize." OACSIM reviews and makes recommendations on installation requests for approval to privatize utility systems within the authority of the Army, or initiates legislative proposals for those that require Congressional authority.

c. Major Commands (MACOMs): MACOMs will support initial feasibility studies at their installations and program resources to conduct all follow on actions that will lead to a transfer of the utility system to the private sector. MACOMs will develop an implementation plan and schedule of milestones for achieving the program goals by the target year. This implementation plan and schedule shall be sufficiently detailed to show each installation utility system, ownership status, potential/interested utility privatization partners, current phase of the privatization process, major short and long term steps and the responsible parties for completing the privatization plan. MACOMs will review all privatization studies conducted at their installations. If the study supports privatization and the installation is pursuing the initiative, the proposed timeline for completion of the action will be forwarded to OACSIM (DAIM-FDF-U). If the study supports privatization, but an installation determines not to pursue privatization, the MACOM will forward the installation's position and supporting rationale along with comments, concurrence or nonconcurrence to OACSIM. The MACOM will also review and endorse to OACSIM all installation determinations that a utility system is uneconomical to privatize or there is no potential to privatize.

d. Installations: Commanders should establish an installation level team of functional experts from resources, contracting, legal, engineering, public affairs, personnel and others as appropriate to privatize their utility systems. The installation will develop a plan within 60 days, to privatize their utility systems when a study indicates it to be cost effective, and in the best interest of the Army. This privatization plan will be forwarded to the MACOM point of contact. If an installation decides not to pursue privatization, then the decision and rationale will be provided the MACOM within 60 days of the completion of the life cycle cost analysis. This includes studies that do not support privatization for economic reasons.

e. U.S. Army Corps of Engineers (USACE)

(1) Headquarters: is responsible for overall real estate/real property policies and uniform procedures for: (a) determining fair market value of utility systems for privatization, and (b) transferring utility systems, both with and without underlying lands, from Army control to a municipal, private, regional, district or cooperative utility company. Headquarters, USACE will ensure that these policies and procedures (See Reference 2e.) are issued and uniformly used by the Corps Districts.

(2) U.S. Army Center for Public Works (USACPW): CPW provides technical support to MACOMs and installations. The support is in conducting privatization feasibility studies, utilities contracting and legal counsel. CPW issues standardized guidance, procedures, and instructions for use by installations, subject to approval by OACSIM. CPW also reviews alternative procedures and new ideas submitted by a MACOM or installation for potential application across the Army.

5. PROCEDURES:

a. Determination of Initial Requirement: All installation exterior utility systems (electrical, natural gas, domestic water, and sanitary wastewater) will be considered potential privatization candidates, unless:

(1) A study including the issuance and processing of a request for proposal (RFP) has been performed and evaluation of the resulting proposals concluded that privatization would not be in the best interest of the Army, or

(2) A completed study including receipt of non-binding proposals has been followed by the issuance and processing of an RFP, and evaluation of the resulting proposals concluded that privatization is not in the best interest of the Army, or

(3) There are documented reasons to support a conclusion that privatization is not in the best interest of the Army, or

(4) There are no interested prospective owners for the utility system under consideration, as determined through a Determination of Interest/Market Survey (paragraph 5.b.) which includes, but is not limited to, canvass of local public utilities and private utility companies, and advertisement in the Commerce Business Daily, and

(5) The determination has been endorsed by the MACOM and approved by HQDA.

b. Determination of Interest/Market Survey: In coordination with the Director of Contracting (DOC), installations will contact local utilities to solicit expressions of interest in the privatization of the exterior utility systems. Informal determinations may be made, prior to initiating a privatization study, or formal market surveys may be made to a larger audience, such as through the Commerce Business Daily. Unless otherwise restricted by federal or state law, utility regulations or public utility commission rulings, solicitations to privatize should be based on full and open competition. If solicitations are to be limited to a specific type of companies or entities, such as regulated utilities, municipal utilities, and/or Rural Electric cooperatives, a Determination and Finding (D&F) must be prepared and provided to the DOC, along with the RFP. If solicitations are to be limited to a specific company or entity, a Justification and Authorization (J&A) for a sole source procurement must be prepared and provided to the DOC, along with the RFP for processing. Standardized RFPs for solicitation of utilities privatization contracts as prepared or approved by the Utilities Contracting Office, CPW may also be issued by the DOC as part of the privatization study, and the results incorporated into the study conclusions and recommendations.

c. Privatization Study: An evaluation of the economic and functional feasibility of privatizing an installation exterior utility system shall be performed and will include:

(1) An inventory and assessment of the existing utility system infrastructure except for natural gas systems. Assessment of natural gas systems will be made in accordance with reference 2.b.

(2) A determination of the required repairs, improvements, and upgrades to meet current and foreseeable utility industry and environmental standards. And an estimate of the 25-year total life cycle cost of the "Status Quo" - continued ownership and operation by the Army.

(3) Solicitation of proposals from all known utility providers and/or providers developed from market surveys.

(4) An evaluation and comparison of the "Status Quo" with the various alternatives submitted by potential utility providers to determine the best value for the Army.

These studies may be conducted using in-house installation assets of comparable experience, technical expertise, and professional standing, or through contracts with CPW. Installations will adhere to the privatization methodologies and procedures instituted and approved by OACSIM, such as scopes of work for RFPs and methods for evaluation of costs, overhead, and "fair market value" of the utility system to be privatized.

d. Requests for Proposals: Within 60 days of the receipt of a final report which concludes that privatizing a utility system is feasible and provides economic benefit to the Army, the installation commander should:

(1) Take all appropriate actions to privatize the utility system, if the privatization study, based on a non-binding concept proposal, was followed by issuance and processing of an RFP, or

(2) Initiate formal negotiations for the transfer of the utility system and procurement of utility service, if an RFP was issued as part of the privatization study process. Ensure that the proposal is still valid or request that it be extended.

e. Real Estate Actions: All real estate actions relating to the privatization of a utility system on active installations taken by the installation commander, the supporting Corps of Engineers District, or others shall be in accordance with Reference 1.e. This includes:

(1) All documents to describe and convey utility plant, equipment, and distribution/collection systems, or to grant utility easements;

(2) All environmental documentation as required by NEPA; and

(3) Utility system valuations.

f. Approval of Status: Installation decisions to categorize a utility system as being "Uneconomical to privatize" or having "No potential to privatize" shall be submitted through the MACOM for comment, concurrence or nonconcurrence to OACSIM for approval.

6. SPECIAL ISSUES:

a. Exclusion from A-76 Requirements: Privatization is an Army installation management decision to exit the utility business by divesting the utility assets and obtaining the services from a utility provider. Because of this divestiture and change in control, an installation utility privatization action is not covered by A-76, Commercial Activities, requirements. As part of the decision process to privatize an installation utility system(s), the installation shall perform an economic analysis and make a life-cycle cost comparison of at least two options: privatization and continued Army ownership. Economic analyses shall be performed in accordance with Reference 2.g.

b. Military Construction and Major Repair Projects for Exterior Utility Systems: All new construction or major repair projects for exterior utility systems will fully evaluate privatization during the project planning phase as the primary alternative, in accordance with AR 415-15. The results of the evaluation, demonstrating that privatization has been determined to be uneconomical or unfeasible, shall be submitted with the project documentation. Maintenance and repair projects will not be processed without privatization study documentation. DD Form 1391 will be certified by the Installation Commander. Projects approved at the HQDA Project Review Board for a program year more than 3 years out will be re-evaluated for privatization opportunities during the concept design phase to ensure that full consideration is given to privatization before committing funds.

c. Personnel Issues: Federal employees, who will be adversely affected by any privatization actions taken under this policy, shall be afforded full consideration as provided for by current Office of Personnel Management regulations for out-placing employees whose functions have been eliminated as a management decision. Installation commanders will exert maximum efforts to obtain a "Right-of-First-Refusal" for jobs for which the affected employees are qualified in any RFP or negotiated contract with the new utility provider.

7. CHANGES: Suggestions or comments should be submitted to Headquarters, Department of the Army, Assistant Chief of Staff for Installation Management, 600 Army Pentagon, ATTN: DAIM-FDF-U, Washington, DC 20301-0600.

DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

CERE-MM (405-80, 405-90) 10
OCT 1997

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Revised Guidance - Privatization/Disposal of Utility Systems at Active Military Installations

1. PURPOSE

Cost effective and reliable utility service is vital to supporting ongoing Army missions at active Army installations. This guidance provides faster and simpler methods of transferring ownership of utility systems from the Army. It is in the best interest of the Army to transfer utility systems as quickly as is feasible. This guidance addresses real estate issues for the transfer of utility systems and is not intended to revise or supersede existing policies and procedures involving power procurement in the privatization process. Utility systems are treated as real property and not personal property. The guidance applies to treatment plants and distribution systems of water, wastewater, natural gas, electric, steam generation heating and telephone systems categorized as real property.

2. APPLICATION

The following will normally be used when an installation requires a utility service contract for continuation of utility service. Such procedure will normally apply to non-BRAC installations and may apply to realigned BRAC installations (Public Law 100-526, as amended, or P.L. 101-510, as amended). It should be noted that the property is not considered excess, unutilized or underutilized and therefore should not require screening with the Department of Housing and Urban Development pursuant to the McKinney Act. When continuing utility service is required for active installations or for realigned installations, the installation utility office may negotiate a favorable rate with the utility company to reflect that the improvements are being transferred as part of the "value in use" or economic value of the utility system the utility company will derive after privatization.

3. PROCEDURE

a. The Installation Director of Contracting (DOC) solicits proposals for utility service in accordance with utility service contracting procedures. It is understood that proposals are solicited even though utility service is located within a state regulated franchise area and only one provider may provide service. The Request for Proposals (RFP) should contain a statement indicating that the utility distribution system may be transferred to the successful offeror and an easement, allowing the successful offeror to construct, own, operate, maintain, repair, and replace the distribution system will also be granted. Sample language for the RFP is attached at Enclosure 1. Early coordination between the DOC, the Director of Public Works (DPW), the MACOM and Corps District representatives is imperative.

b. (1) Concurrently with a. above, the DPW prepares a DA Form 337 which annotates the utility system to be conveyed as described in the installation real property inventory and will also prepare the appropriate environmental documentation required for the conveyance. Valuation of the utility distribution system is discussed below.

(2) The installation forwards the completed DA Form 337 to the MACOM along with a request to issue an utility easement to the entity. No Report of Availability is required for easements in support of utility contracts servicing the installation. Such easements are granted without charge. Consideration for the easement is the operation and maintenance of the facilities for the benefit of the United States and the general public. The easement term may be perpetual or indefinite but should be no less than the term of the proposed utility contract. Additionally, the installation, in coordination with the District, shall develop a description of the easement to be attached as an Exhibit to the easement instrument. As-built construction drawings, plat maps, etc. of the utility system may be used in lieu of an actual metes and bounds survey as

the legal description for the easement. Should the utility company require a metes and bounds description, the cost of such description shall be borne by the utility company.
(3) The MACOM approves the DA Form 337 and the request to issue an utility easement and forwards the approved request to the District. The District prepares the easement in accordance with the format provided at Enclosure 2. The easement should be issued under the appropriate easement authority: 10 U.S.C. 2668 or 10 U.S.C. 2669 or the BRAC authority, P.L. 100-526, as amended, or P.L. 101-510, as amended, if applicable.

c. An easement issued under the authorities cited above may not include more land than is necessary for the easement; may be terminated by the Secretary for (1) failure to comply with the terms of the grant; (2) nonuse; or (3) abandonment. The foregoing easement termination conditions apply only during Government ownership of the underlying fee estate. We intend to use one document to convey title to the improvements and also grant an easement to the entity allowing the entity to own, operate, replace and maintain the utility system on the installation. Language conveying title to the improvements to the entity is incorporated into the instrument. However, should the entity request a separate bill of sale or deed for the improvements, the District may prepare the document on a case by case basis.

d. The DOC reviews proposals submitted by prospective service providers, negotiates with the offeror(s) and selects the entity which will provide the Government with the best offer for utility service. The District then executes the easement citing the selected offeror as the grantee.
4. VALUATION

a. Valuation of utility distribution systems encompass two elements: the land area and the improvements. Typically the Government has granted, without cost, to the utility company an easement for distributions systems. The assumption was that the easement was for the benefit of the Government. The improvements, pipes, wires, poles, transformers, etc., are carried on the installation’s books as real property.

b. The value of a distribution system is in the real estate it serves. Current Federal valuation policy for streets, highways, roads and alleys is that the value is "reflected in the value of the adjoining lots." The Uniform Appraisal Standards for Federal Land Acquisitions (The Yellow Book) states that "in most instances, the subdivider dedicates the streets to public use free of charge because of resulting enhancement." Utility distribution systems (for subdivisions) are typically installed by a subdivider and given to the utility company or municipality. In instances where a utility company installs a distribution system, or distribution lines, the utility company imposes an assessment against the real estate to repay its costs. The assessment reduces the cost to the provider i.e., the utility company or municipality.

c. In light of the foregoing, we recommend that all utility distribution systems be found to contain a nominal value for the real property component of say $1.00. The recommendation is based upon the premise that the Government’s value is captured in the sale of the installation lands during disposal actions, and retained during continued use of the real estate in the case of privatization.

d. Please note that any potential value-in-use, economic value or present value of anticipated net cash flows/future income pertaining to continued use, must be handled separately, should not be considered part of the real property valuation, and may be taken as a credit to the utility bill by the installation and applied towards the negotiated reduced utility service rates. This may be thought of as a "business value" attributable to the delivery of the product or service, i.e., the generation of income.

5. FEE CONVEYANCE

In instances where the ownership of the underlying land (fee interest) as well as the improvements are to be conveyed to a utility company, such as water and wastewater treatment plants the following procedures should be used.

a. The location of the improvements within the installation boundaries must first be considered to determine the necessity to convey a fee interest in land versus granting an easement at non-BRAC installations. Should the improvements be located at the interior of the installation, granting an easement in accordance with the above described procedures is the recommended course of action. The conveyance of

a fee interest at non-BRAC installations without special legislation is discouraged due to the complexity of the process as described in paragraph b(1) below.

b. AR 405-90 provides guidance on the disposal of land and improvements. The installation will prepare a Report of Excess (ROE) in accordance with AR 405-90 and forward the ROE to the MACOM. The ROE will state that the property to be transferred is not excess to the needs of the Army. During preparation of the ROE, the installation should consult with the District to obtain an estimate of value for the property. If the value exceeds the Army's delegated disposal authority ($15,000), a decision must be made as to whether special legislation authorizing direct conveyance to the entity should be pursued. [NOTE: At the time of this writing, DA is attempting to introduce generic legislation amending Title 10, United States Code, allowing military departments to convey utility distribution systems located at any installation and regardless of value directly to a utility company or other entity.]

(1) If no special legislation has been enacted the following occurs:

(a) The MACOM approves the ROE and forwards the ROE to the District.

(b) The District reports property to the General Services Administration (GSA) advising the GSA that the property is not excess and may be available to public entities as a public benefit conveyance. [NOTE: Close coordination between the GSA, the District and the installation is imperative.]

(c) The DOC negotiates a utility service contract with the utility provider subject to technical and legal approval by the Directorate of Army Power Procurement IAW
AR 420-41.

(2) If special legislation is enacted the following occurs:

(a) The installation prepares an ROE in accordance with AR 405-90 and forwards the ROE to the MACOM.

(b) The MACOM approves the ROE and forwards to the District

(c) The District appraises property, if required under terms of legislation, and conveys property to the entity at the consideration specified in legislation. Should easements be required in support of the fee transfer of the treatment plant, the procedures described above should be followed.

(d) The DOC negotiates a utility service contract with the entity specified in legislation.

(3) For realigned BRAC installations, P.L. 100-526, as amended, or P.L. 101-510, as amended, will be cited as the conveyance authority.

6. COORDINATION

This guidance has been coordinated with Mr. Eng, DAIM-FDF-U, Mr. McCulla, CECPW-C, Mr. Birney, OASA(I,L&E), Mr. McMullen, CERE-E and Mr. Paterson, CERE-C.

FOR THE COMMANDER:

/S/
Encl B. J. FRANKEL
Director of Real Estate

YEAR 2000 COMPUTING CRISIS

Hello Houston - I mean AMC - we have a problem! And the problem is approaching at a measured speed of 3,600 seconds per hour with impact due in less than 27 months. The date of impact will be approximately Friday, 31 December 1999 unless you haven't taken any measures to avoid the problem. In that case your computer will indicate the date, incorrectly, as Monday,
1 January 2000. And except for the fact that it is New Year's Day you will probably be at work.

The problem, known variously as the Year 2000 Problem, the Y2K Problem, or the Millennium Bug, has been described by computer industry experts as one of the most expensive problems in human history. The Gartner Group (a Stamford, CT, based international information technology consulting firm) estimates the cost of correcting the Year 2000 problem worldwide will be $300 billion to $600 billion. In a report titled "The Global Economic Impact of the Year 2000 Problem," Capers Jones, the Chairman of Software Productivity Research, states that for the United States more than four months of effort may be needed on the part of every software professional in the country to repair the Year 2000 problem, with repair costs that may exceed $2000 for every working person in the United States. The Office
of Management and Budget, which tracks the progress of Year 2000 conversions by federal agencies, recently (15 August 1997) increased the estimated government-wide costs for fixing the problem from $2.8 billion to $3.8 billion. Steven Hock, writing in the American Bar Association Journal, projects that the final tab for business disruptions and legal costs for Year 2000 system failures could reach a trillion dollars.

This "problem" arises from the convention of using six digits to represent calendar dates with just. Two digits for the year and the decade ("97", for example, for 1997). The century designation, which has remained constant since computers were invented, is always assumed to be "19". Originally this Convention saved limited processing memory. More recently,
six digits were used by programmers out of habit or in order to assure that new software programs would interface with older programs using six digit date fields. A format using two digits to represent the year is limited to a span of 100 years with 00 as 1900 and 99 as 1999. When the millennium arrives and calendars roll over from 99 to 00, the date will not advance into the next century but will return to 1900 again. Unless fixed, computers relying on this cyclic calendar will repeat the twentieth century over and over again. Life for you

and your computer in this cyclic universe in which 99 + 1 = 00, but 00 <99 will be tough. If, on or after the date 01-01-00, you decide to escape the problem by flying off to some non electronic, non computer oriented paradise you may discover that your flight has been canceled because computers in the airlines maintenance department have grounded all aircraft claiming they are 99 years overdue engine and airframe overhauls. It would also appear that the pilots have been on duty for 875,000 hours in violation of FAA rules. All this will abort your escape in which you planned to spend the almost 100 years of interest the bank has calculated as earned on the $1,000 deposit you made into your account in late December 1999 (December 1999, subtracted from January 2000 = 01-00 minus 12-99 = -99 years
11 months or -36,465 days since you made the deposit). Since a negative period of deposit and a negative period of duty for the pilots makes no sense, computers will probably ignore the negative signs. While contemplating your spoiled vacation you can peruse the notice of some seriously overdue books you have received from the library and the credit card statement with late charges and interest for almost 1200 months.

What is the scope of the problem? The $1 trillion tab for business disruptions and system failures mentioned above are based on a conservative 5 percent failure rate. According to Jon Newberry, writing in the ABA Journal, some experts place the likely failure rate for desktop computers - IBM Compatible machines - at 80 percent to 90 percent with a higher failure rate for mainframe computers. Los Angeles lawyer Vito Peraino, testifying before Congress in March 1997, characterized the
Year 2000 problem as a "litigation catastrophe that will happen in just a matter of time." And don't limit your worry about the Year 2000 problem just to computer software. The problem can also exist in computer hardware (e.g., clocks in the BIOS code located on the PC (ROM) chips, in client/server environments and in embedded systems. The Year 2000 problem in imbedded chips arises from the fact that microchips with hard coded date logic reside as a component in many products. These date sensitive microprocessor "chips" may fail in elevator systems, security systems (such as time locks on bank vaults), communication equipment including the Global Positioning System (GPS), AND in the on-board computers in many weapon systems, ships, tanks, and military aircraft. Logistics systems and various command and control systems will also be affected by the Year 2000 problem. By way of an example, the 15 September 1997, issue of Government Computer News reported that the DOD Global Command and Control System crashed when the date was rolled over to the year 2000 during a Joint Warrior Interoperability Demonstration (JWID) conducted 7 July through 1 August 1997. Another built-in time bomb may be in

the firmware of
the satellites of the Global Positioning System. The
satellites keep track of the date by counting the weeks since
6 January 1980. The count has a maximum range of 1,024 weeks. It
follows that on 21 December 1999, the counter will roll over and GPS
receivers will think it is 1980 all over again. Vito Peraino
testified that the embedded chip problem is one of the least
publicized and most legally significant aspects of the Year 2000
problem. Another facet of the Year 2000 problem may be the
application program interface (API) used by systems to communicate
with each other. If a system's API includes a date with the year then
modification of that system to correct the problem will change its
API. As a result, each system using that API must now be modified to
accept and use the changes. The solution for one system affects all
systems with which
it interfaces. Although the Year 2000 problem may not be a virus, it
can "contaminate" a computer system. On Wednesday,
8 January 1997, the Coast Guard's proprietary software operating
system, called CTOS began to act in a bizarre manner. The standard
spreadsheet program would not run on certain days of the week but would
run on other days. The problem originated in the interaction between
software elements that comprise the CTOS and the manner in which dates
were handled after the new year began. The crash of DOD's GCCS,
mentioned above, was caused in part by running Year 2000 non-compliant
applications on a Year 2000 compliant operating system. It should be
noted that similar problems can occur if two systems intended to
interface are made Year 2000 compliant using different techniques that
are incompatible.

The Gartner Group has estimated (with a probability of 0.7) that
approximately fifty percent (50%) of the companies with a Year 2000
problem will not become compliant in time and will have all or part of
their computer systems shut down or start producing incorrect data on
or after 1 January 2000. The General Accounting Office (GAO) has
released a report (GAO/T-AIMD-97-129) on the Year 2000 Computing
Crisis titled "Time if Running Our for Federal Agencies to Prepare for
the New Millennium." The GAO Report outlines the five phases of the
Office of Management and Budget's strategy of best practices for
federal agencies for addressing the Year 2000 problem. The second of
five milestones in the strategy, Assessment, was supposed to be
completed in June 1997. The Office of Management and Budget Report to
Congress on 15 August 1997, states that DOD is only sixty percent
(60%) complete in the Assessment Phase. Further, in the report DOD
claims that it will complete the final phase, Implementation, in
November 1999, one month before the millennium arrives. However,
Fiscal Year 2000 starts

1 October 1999.

Now that we know the enemy, what can we do and when must we do it? This brings up another facet of the problem. There are in excess of two thousand software programming languages in existence, with perhaps five hundred programming languages in current usage. Some of those languages use high order digits ("99"), particularly in the date field, to cause special "exception" logic. In this situation "99" usually meant either the end of a file, the field is blank, or no date was available. This means that 1 January 1999 (01-01-99) or 9 September 1999 (09-09-99), may be drop dead dates. We can fix the problem in our contracts prospectively by using the recommended Year 2000 contract language on warranties furnished by the Interagency Year 2000 Committee. This language may be found on the Army Year 2000 homepage. See Internet URL http://imabbs.army.mil/army-y2k. When crafting the warranty provision you must remember to include some language covering program interface with other applications. At least, if the contractor is put on notice that interface with other applications may be required, implied warranties of merchantability and fitness for a particular purpose may apply (if you are buying a commercial product). If the software is non-commercial in nature, a Year 2000 non-compliant program that crashes may be considered "defective" (contemplate an argument by the government that the calendrical change to the new millennium on 1 January 2000 was unanticipated and not easily discoverable and is, therefore, latent or listening to a contractor try to explain that he didn't know a new millennium would occur on 1 January 2000 and he didn't intentionally deliver a product that he should have known would fail). One thing is certain, if the agency simply proceeds to correct the Year 2000 problem without first making a claim against the contractor, it is likely that any remedies will be waived. Other sensitive issues will likely be potential violations of license agreements, copyright infringement, and disclosure of proprietary information whether the government makes the modifications to software itself or uses a support contractor.

All the information in this article was downloaded from the Internet. The Defense Information Systems Agency (DISA) homepage at http://www.disa.mil/cio/y2k/cioosd.html and the Army Year 2000 homepage at http://imabbs.army.mil/army-y2k are good places to start. You can access all the information you ever wanted to know about the Millennium Bug and more, much more. You will become convinced that the Year 2000 problem is extremely serious and in need of immediate attention. As for me, I'm not worried. After all on 28 December 1999, I will be sixty years old, having been born in 1939. On 1 January 2000,
I will be only 39 years old (00-39 = -39) and since my computer tells

me that is a Monday, I will be especially happy that it is a holiday and I don't have to work.

DAL WIDNER
Attorney Advisor

ENVIRONMENTALLY RELATED EXECUTIVE ORDERS

1997

Federal Support of Community Efforts Along American Heritage Rivers
Executive Order 13061
September 11, 1997, 62 FR 48442

This EO establishes responsibilities of executive agencies with regards to the American Heritage Rivers initiative (river conservation, community health and revitalization) and defines the criteria for communities to nominate rivers as American Heritage Rivers. Executive agencies, to the extent permitted by the law, are to coordinate their plans, functions, programs and resources to preserve, protect and restore rivers designated as American Heritage rivers by the President or as nominated by communities. Section 4 of this EO identifies the responsibilities of Federal agencies, which include commitment to a policy that their actions will have a positive effect on the natural, historic, economic, and cultural resources of American Heritage River communities.

Protection of Children From Environmental Health Risks and Safety Risks
Executive Order 13045
April 21, 1997, 62 FR 19883

This EO notes that children suffer disproportionately from environmental health and safety risks due in part to a child's size and still maturing bodily systems. To address this problem, Federal agencies are directed, to the extent permitted by the law and their mission, to identify and assess environmental and safety risks that could disproportionately affect children and ensure their policies, programs, activities and standards address these disproportionate risks. The focus of this EO is on identifying risks to health or safety that are attributable to substances or products that a child is likely to come in contact with or ingest as a result of a particular federal action.

1996

Indian Sacred Sites
Executive Order 13007
May 24, 1996, 61 FR 26771

This EO requires that, to the extent practicable, executive branch agencies with statutory or administrative responsibility for the management of Federal lands shall accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and avoid adversely affecting the physical integrity of such sacred sites. Executive branch agencies with responsibilities for managing Federal lands will insure that, where appropriate, procedures are established for providing reasonable notice of proposed actions or land management policies that could restrict the ceremonial use of, or adversely affect the physical condition of the sacred site. Executive branch agencies are to comply with the Executive memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments when conducting actions under this EO.

Locating Federal Facilities on Historic Properties in our Nation's Central Cities
Executive Order 13006
May 21, 1996, 61 FR 26071

This EO reaffirms the Clinton Administration's commitment, as identified in EO 12072, to strengthen the Nation's cities by encouraging the location of Federal facilities in central cities; to provide for leadership in the preservation of historic resources pursuant to the National Historic Preservation Act; and to acquire and utilize space in suitable buildings of historic, architectural, or cultural significance pursuant to the Public Buildings Cooperative Use Act of 1976.

1995

Federal Acquisition and Community Right-to-Know
Executive Order 12969
August 8, 1995, 60 FR 40989

To the greatest extent possible, Federal agencies are to contract with companies that provide information to the public on their toxic chemicals released to the environment. Federal agencies are to include in contract solicitations as an eligibility criteria for competitive acquisition contracts expected to equal or exceed $100,000 the requirement that Federal contractors ensure that Toxic Chemical Release Inventory Forms under the Emergency Planning and Community Right-to-Know Act (EPCRA) are filed by their covered facilities for the life of the contract.

1994

Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations
Executive Order 12898,
February 11, 1994, 59 FR 7629

This EO directs federal agencies, through development of an agency-wide environmental justice strategy, to identify and address disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority and low-income populations in the United States. Federal agencies are to execute their programs, policies, and activities that substantially affect human health or the environment in a way which ensures these activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities because of their race, color, or national origin.

On February 11, 1994, the President also issued a memorandum for heads of all departments and agencies directing that the Environmental Protection Agency, whenever reviewing environmental effects of proposed actions pursuant to its authority under Section 309 of the Clean Air Act, ensure that the involved agency has fully analyzed environmental effects on minority and low income communities to include human health, social, and economic effects.

Energy- Efficiency and Water Conservation
Executive Order 12902
March 8, 1994, 59 FR 11463

To comply with this EO, Executive Agencies are to reduce overall energy use in Federal buildings by 30 percent by the year 2005, increase overall energy efficiency in industrial facilities by 20 percent by 2005, and implement water conservation projects, to the extent these measures are cost-effective. Executive Agencies are to conduct comprehensive facility audits and minimize the use of petroleum products by switching to less polluting alternative energy sources when practicable. The Department of Energy is designated to take the lead in implementing this order through the Federal Energy Management Program.

Government to Government Relations with Native American Tribal Governments
Presidential Memo
Apr. 29, 1994, 59 FR 22951

The President issued a memo to all heads of executive departments and agencies regarding future relationships with Native American tribal governments. As executive departments and agencies undertake activities affecting Native American tribal rights or resources, these activities should be executed in a knowledgeable and sensitive manner that is respectful of the tribal sovereignty. This memorandum outlines the principles that executive department and agencies are to follow when interacting with Native American tribal governments.

Federal Implementation of North American Agreement on Environmental Cooperation
Executive Order 12915
May 13, 1994, 59 FR 25775

As part of the North American Free Trade Agreement (NAFTA), the Environmental Cooperation Agreement (ECA) is implemented to advance sustainable development, pollution prevention, environmental justice, ecosystem protection and biodiversity preservation in a manner promoting transparency and public participation.

The ECA must be implemented to promote cooperation on trade and environmental issues among the U.S., Canada and Mexico. The primary emphasis is on considering the environmental impact of goods throughout their lifecycles.

The Administrator of the Environmental Protection Agency is the U.S. representative on the Council for the Commission for Environmental Cooperation. The policies and positions of the U.S. in the Council are coordinated through interagency procedures. The EPA will enlist state involvement when the ECA activities have a direct impact on the States. Areas for future state involvement include dispute resolution and any activities where the states exercise concurrent or exclusive legislature, regulatory, or enforcement authority.

1993

Procurement Requirements and Policies for Federal Agencies for Ozone-Depleting Substances
Executive Order 12843
April 21, 1993, 58 FR 21881

This EO requires Federal Agencies to maximize use of alternatives to ozone depleting substances and requires the modification of procurement specifications and practices to substitute non-ozone depleting substances to the extent economically practicable. The effective date of this order was 30 days from the date of the order.

Federal Use of Alternative Fueled Vehicles
Executive Order 12844
April 21, 1993, 58 FR 21885

This EO directs the Federal Government to exercise leadership in using alternative fueled vehicles in accordance with the Energy Policy Act of 1992 (Public Law 102-486). Essentially, the federal fleet acquisition program is restructured by this EO. The use of alternative fueled vehicles is to be promoted to the greatest extent possible to reduce pollutants and vehicle maintenance costs and increase use of domestic fuel sources and economic activity.

By way of setting an example, this federal action may provide a significant market impetus for developing and producing alternative fueled vehicles and for expanding the infrastructure needed to support the private use of alternative fueled vehicles.

Purchasing Energy Efficient Computer Equipment
Executive Order 12845
April 21, 1993, 58 FR 21887

This EO directs the heads of Federal Agencies to meet the Environmental Protection Agency's 'Energy Star" energy efficiency requirements when purchasing computer equipment. In addition, such equipment is to be equipped with an energy efficient low-power stand-by feature unless the equipment meets the Energy Star efficiency levels at all times. This EO establishes a requirement to educate staff about the environmental and economic benefits of energy efficient computer equipment. The effective date of this EO was 180 days from the date of the order, approximately mid-October 1993.

Federal Compliance with Right to Know Laws and Pollution Prevention Requirements
Executive Order 12856
Aug. 4, 1993, 58 FR 41981

This EO requires Federal agencies to take the necessary actions for pollution prevention and ensure compliance with the Pollution Prevention Act (PPA) and the Emergency Planning and Community Right-to-Know Act (EPCRA) provisions and implementing regulations. Federal agencies are to provide information to the public concerning toxic chemicals entering any wastestream from their facilities, including releases to the environment, and to improve local emergency planning, response, and accident notification. Reporting under EPCRA and PPA shall be completed no later than the 1994 calendar year with reports due on or before July 1, 1995.

Regulatory Planning and Review
Executive Order 12866
Sep. 30, 1993, 58 FR 51735

This EO directs Federal agencies to promulgate only those regulations that are absolutely necessary to interpret the law or are made necessary by a compelling public need. Agencies are to assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. The goal in selecting a regulatory approach is to maximize net benefits to include economic, environmental, public health and safety, distributive impacts and equity. This EO sets out the Principles of Regulation which agencies should adhere to, as allowed by law and where applicable, and appoints the Office of Management and Budget (OMB) with the function to review agency rulemaking to insure that the proposed regulations are consistent with the applicable law, the President's priorities, and other guidance contained in this EO.

Federal Acquisition, Recycling and Waste Prevention
Executive Order 12873
Oct. 20, 1993, 58 FR 54911 as amended by EO 12995, March 25, 1996, 61 FR 13645

This EO requires the federal government to incorporate waste prevention and recycling into daily operations and work to increase markets for recovered materials through greater federal government preference and demand for such products. Environmentally preferable products are those products/services that have a lesser or reduced effect on human health and the environment as compared to other competing products serving the same purposes. The use of environmentally preferable products extends from raw materials, acquisition efforts, production, operations and maintenance through disposal of the product or service. However, to be most effective, the use of environmentally friendly products should be examined at the earliest point possible in the project.

1987

Superfund Implementation
Executive Order 12580,
January 23, 1987, 52 FR 2923 as amended by EO 12777, October 18, 1991, 56 FR 54757 and EO 13016, August 28, 1996, 61 FR 45871

This EO specifies which federal agencies should be represented on the National Response Team (NRT), the NRT being a requirement under the National Contingency Plan, and delegates from the President to certain federal agencies several decision-making authorities under the Comprehensive Environmental Response, Compensation, and Liability Act.

1979

Environmental Effects Abroad of Major Federal Actions
Executive Order 12114
January 4, 1979, 44 FR 1957

Federal agencies taking major Federal actions having significant effects on the environment outside the geographical borders of the United States and its territories and possessions must prepare either an environmental impact statement, bilateral or multilateral environmental studies relevant to the proposed action, or concise reviews of the environmental issues involved with the purpose of providing decisionmakers with information, heightening their awareness of and interest in environmental concerns and, as appropriate, facilitating environmental cooperation with foreign nations.

Independent Water Project Review
Executive Order 12113
January 4, 1979, 44 FR 1955

Beginning April 1, 1979, all agencies are to submit preauthorization reports or proposals and preconstruction plans for Federal and Federally assisted water, and related land resources, projects and programs to the Water Resources Council at least 90 days prior to their scheduled submission to the Office of Management and Budget for authorization and funding requests for those activities.

1978

Federal Compliance with Pollution Control Standards
Executive Order 12088,
October 13, 1978, 43 FR 47707 as amended by EO 12580, January 23, 1987, 52 FR 2923

This EO requires Executive agencies to take the necessary actions for the prevention, control, and abatement of environmental pollution for Federal facilities and agency activities under their control and to comply with applicable pollution control standards. At the request of the Environmental Protection Agency, the Director of the Office of Management and Budget shall consider unresolved conflicts regarding a violation by an Executive agency of an applicable pollution control standard. Executive agencies should ensure that the construction or operation of Federal facilities outside the United States complies with the environmental pollution control standards of general applicability in the host country or jurisdiction.

1977

Floodplain Management
Executive Order 11988
May 24, 1977, 42 FR 26951

This EO requires federal agencies to incorporate actions to reduce the risk of flood loss by minimizing the impacts of floods on human safety, health, and welfare in carrying out assigned responsibilities for managing and disposing of federal lands. The goal is to restore and preserve the national and beneficial values served by floodplains. Before taking an action, agencies must determine whether a proposed action will occur in a floodplain and if so, must look at alternatives to avoid adverse effects and incompatible development in the floodplains. For major Federal actions significantly affecting the environment, the alternatives analysis must be included in any statement prepared under Section 102(2)(C) of the National Environmental Policy Act.

Protection of Wetlands
Executive Order 11990
May 24, 1977, 42 FR 26961

This EO requires federal agencies to incorporate actions to minimize the destruction, loss, or degradation of wetlands and to preserve and enhance the natural and beneficial values of wetlands while carrying out the agencies' responsibilities for managing and disposing of federal lands and facilities. Each agency, as allowed by law, should avoid new construction in wetlands unless the agency determines there is no practicable alternative to the proposed construction and the proposed action includes all practicable measures for mitigation. For any proposal for lease, easement, right-of-way, or disposal to nonfederal public or private parties, the federal agency is to reference in the conveyance document those uses which are restricted under federal, state or local wetland regulations. Other appropriate restrictions on use must be attached to the use of the property by the grantee or buyer and any successor, except where prohibited by law. Without the appropriate restrictions attached, the properties should be withheld from disposal.

Exotic Organisms
Executive Order 11987
May 24, 1977, 42 FR 26949

This EO directs Executives agencies, to the extend permitted by law, to restrict the introduction of exotic species into the natural ecosystems on lands and waters which they own, lease, or hold for purposes of administration. For purposes of this EO, an "exotic species" is defined as all species of plants and animals not naturally occurring, either presently or historically, in any ecosystem of the United States.

1973

Providing for Administration of the Clean Air Act and the Federal Water Pollution Control Act with respect to Federal Contracts, Grants, or Loans
Executive Order 11738
September 12, 1973, 38 FR 25161

This EO requires the Environmental Protection Agency to designate those facilities which have violated the criminal provisions of either the Clean Air Act or the Federal Water Pollution Control Act. Unless exempted, no Federal agency may then enter into any contract or support an activity or program through a grant, loan or contract involving the use of a designated facility. Federal agencies must also require, as a condition of entering into, renewing, or extending any contract, grant, or loan a provision which requires compliance with the Clean Air Act and Federal Water Pollution Control Act in the facilities where the contract, grant, or loan is to be performed.

1972

Use of Off-Road Vehicles on the Public Lands
Executive Order 11644
February 9, 1972, 37 FR 2877, as amended by EO 11989, May 24, 1977, 42 FR 26959

This EO requires the Secretary of the Interior, the Secretary of Defense, the Secretary of Agriculture, and the Board of Directors of the Tennessee Valley Authority to develop and issue regulations within six months of the date of this order to provide for the administrative designation of the specific areas and trails on public lands on which the use of off-road vehicles may be permitted and those areas where such vehicles may not be permitted.

Environmental Safeguards on Activities for Animal Damage Control on Federal Lands
Executive Order 11643
February 9, 1972, 37 FR 2875

This EO restricts the use of chemical toxicants on Federal lands for the purpose of killing predatory mammals or birds

1970

Protection and Enhancement of Environmental Quality
Executive Order 11514 and 11991
March 5, 1970, 35 FR 4247 as amended by EO 11991, May 24, 1997, 42 FR 26967

These EOs direct the federal government to provide leadership in protecting and enhancing the quality of the nation's environment to sustain and enrich human life. As part of the process under the National Environmental Policy Act (NEPA), Federal agencies are to develop programs and measures to protect and enhance environmental quality and are to assess progress in meeting their objectives. Other federal agencies, states, and local governments can be consulted in order for an agency to carry out its activities that could affect the quality of the environment.

Agencies are to develop procedures to ensure that information and understanding of federal plans/programs with environmental impact are publicized to obtain the views of interested parties. Agencies should also encourage state and local agencies to adopt similar procedures for informing the public concerning their own activities that affect the quality of the environment.

Agencies are to review their statutory authority, regulations, policies and procedures to identify any deficiencies that would prevent them from complying with the requirements of the NEPA. Any deficiencies should be identified to the Council on Environmental Quality (CEQ) with a proposed resolution. In addition, agencies are to comply with CEQ regulations except where such compliance would be inconsistent with statutory requirements.

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Update on Lead Based Paint (LBP) in the Soil - MAJ Allison Polchek

The issue of LBP in the soil is a considerable controversy between the Environmental Protection Agency (EPA), States, and the Department of Defense. This problem arises when LBP applied to the exterior of a building flakes off during the normal weathering process and deposits in the soil around the building. This issue often comes to light during the transfer of property at Base Realignment and Closure (BRAC) sites, and typically has been raised through non-concurrences on draft Findings of Suitability to Transfer (FOSTs) and Findings of Suitability to Lease (FOSLs), under the recently enacted early transfer authority of Section 334 of the FY 97 Defense Authorization Act, and with EPA approval of Records of Decision (RODs) at National Priority List (NPL) sites.

The regulators' position is that the soil surrounding buildings should be cleaned up under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This cleanup would include soils around all types of buildings, from residential to industrial. The Army position, however, is that LBP in the soil is not actionable under CERCLA, but should instead be addressed under the Residential Lead-Based Paint Hazard Reduction Act of 1992 (Title X). Title X applies only to residential buildings that are considered target housing. Target housing is generally defined as residential housing constructed before 1978. In addition, the Army generally uses Title X for areas adjacent to target housing (i.e., playgrounds).

The controversy recently reached a new level when the State of Indiana, dissatisfied with the Army's approach to LBP at Ft. Benjamin Harrison, invoked dispute resolution procedures under the Department of Defense and State Memorandum of Agreement (DSMOA). While there is a question whether the DSMOA is an appropriate mechanism to address the issue, talks are progressing with the State in hopes of reaching a solution. ELSs should be aware that this new approach to raise the LBP issue could be used at other installations.

Until this issue is settled, Army installations should continue to follow current Army policy. At BRAC sites where the EPA non-concurs on a FOST or FOSL, the comment should be attached as an unresolved comment and processed normally through Army channels. The DoD Policy on Lead-Based Paint at Base Realignment and Closure Properties remains in effect. Transferees will continue to be notified of the issue of LBP, and the requirement to abate will generally be passed on to the transferee. At sites where a ROD or the section 334 process is contemplated, installations should not agree to do any sampling or remediation of soils without major command or HQDA approval. Finally, should a state attempt to invoke the DSMOA process, contact your major command immediately.

EPA's Uniform Hazardous Waste Manifest Revisions Project - Major Lisa Anderson-Lloyd

As of December 1997, EPA's Office of Solid Waste began holding meetings for both the public and State regulators to announce the Uniform Waste Manifest Revisions Project.[1] In addition to outlining the strategies that EPA is considering in an upcoming rulemaking, EPA is soliciting input on whether EPA's proposed strategies would reduce the burden of the current system. In the meetings, EPA will explain why manifest revisions are needed and the constraints EPA is under in designing a new system.

EPA believes revisions are necessary to reduce the variability and inefficiencies in the present system and to increase overall effectiveness in tracking hazardous waste. The record-keeping burden of the system is high with a total of 4.8 million hours/year and $192,000,000/year expended in complying with requirements. EPA estimates the Federal burden as 86% of the total. A primary problem with the current system is the patchwork of requirements from State to State. The number of copies, the acquisition process, manifest fees, and submission requirements vary by State. The principal constraints in revising the manifest system are RCRA requirements, Department of Transportation shipping requirements, and state regulatory needs.

EPA's approach in designing a new manifest system is three-pronged. First, proposed revisions to the manifest form will include eliminating many unnecessary data fields and streamlining routing requirements. Secondly, automation improvements will be studied toward the goal of making the system more effective and efficient. Possible automation improvements include automating the entire manifest cycle, developing electronic signature standards, and allowing electronic storage of records. The third prong of the revised system is the examination of possible exemptions from the manifest system. Two significant exemptions being considered are the elimination of redundant requirements for generators with multiple sites and eliminating the requirement for full manifests for shipment of recyclables.

In January 1998, EPA and three States will begin a pilot project to test the electronic tracking of the generation, storage, and disposal of hazardous waste. The project will test an electronic date exchange system that transfers data electronically from facility to regulatory agency. The second part of the pilot project will test the electronic signature technology that ensures the integrity and security of the manifests. This project will assist EPA in drafting the rulemaking that EPA expects to propose in October 1998.

Committee Nears Completion of Review of Overseas Environmental Baseline Guidance Document-MAJ Mike Egan

An interservice committee, comprised of representatives of the Military Departments, the Chairman of the Joint Chiefs of Staff, and the Defense Logistics Agency[2] is scheduled to complete review of the Overseas Environmental Baseline Guidance Document (OEBGD) during the second quarter of FY 98.

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[1] This article is based on the first public meeting held by EPA on 11 December 1997 in Crystal City, Virginia, and on materials provided at that meeting. (Materials on file with author)

[2] Committee membership is determined pursuant to DODI 4715.5, Management of Environmental Compliance at Overseas Installations, April 22,1996.

The OEBGD lays out implementation guidance, procedures, and criteria for environmental compliance at DoD installations outside the United States, its territories and possessions, i.e., overseas installations. The OEBGD is to be used by the Environmental Executive Agents appointed by the Office of the Secretary of Defense for host nations where significant DoD installations are located. The document includes specific DoD environmental criteria which are to be used by Environmental Executive Agents in developing the final governing standards to be used by all DoD installations in the host nation concerned. Unless inconsistent with applicable host nation law, base rights, and/or Status of Forces Agreements or other international agreements or practices established pursuant to such agreements, the baseline guidance shall be applied by the DoD components stationed in foreign countries when host nation environmental standards do not exist, are not applicable, or provide less protection to human health and the natural environment than the baseline guidance. [3]

Upon completion of review and revision of the document, the interservice committee will forward the OEBGD to the Deputy Under Secretary of Defense (Environmental Security) for coordination, final approval and distribution.

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[3] DoDI 4715.5, Management of Environmental Compliance at Overseas Installations, April 22,1996, Para. 3.c. (1).

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Storage and Disposal of Non-Department of Defense (DoD) Toxic and Hazardous Materials- MAJ Allison Polchek

Section 343 of the National Defense Authorization Act for Fiscal Year 1998[1] provided welcome news for installations facing the problem of non-DoD entities wishing to store or dispose of toxic or hazardous materials on DoD installations. This provision amended 10 U.S.C. § 2692 that generally forbade the storage or disposal of such materials.[2]

Initially, section 343 amended 10 U.S.C. § 2692(a) to permit storage or disposal of materials which are owned by the DoD or by a member of the armed forces or dependent family members assigned to installation housing.[3] In effect, this amendment now allows soldiers and their families to legally possess toxic and hazardous materials such as pesticides and household cleaning supplies.

In addition, section 343 greatly expanded the number of exceptions to the general prohibition against storage or disposal of non-DOD toxic or hazardous materials. Under the previous authority of 10 U.S.C § 2692, non-DoD entities could store or dispose of toxic or hazardous materials only under extremely limited circumstances. In particular, this statute provided hardships for Base Realignment and Closure (BRAC) installations, as local reuse authorities seeking to redevelop the property could not obtain the needed exemptions to store the materials of potential lessees pending conveyance.

One of the more important changes to the exemptions in the statute is that which permits storage when the Secretary of the Army determines that the "material is required or generated in connection with the authorized and compatible use of a facility of the DoD . . . ."[4] This situation will encompass the BRAC situation, allowing reuse authorities more flexibility in marketing property to potential lessees. A second exception will allow installations to assist federal, state or local law enforcement agencies temporarily store explosives.[5] Another significant exception will permit

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[1] National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 343 (Nov. 11, 1997)[hereinafter Authorization Act].
[2] 10 U.S.C. § 2692 (1997).
[3] Authorization Act § 343(a).
[4] Authorization Act § 343(d). The amendment also authorizes the Secretary to permit treatment and disposal of non-DoD materials in more limited circumstances. Authorization Act § 343(e).
[5] Authorization Act § 343(c). The statute previously only permitted such assistance to federal law enforcement agencies. 10 U.S.C. § 2692(b)(3).

storage, treatment, or disposal of materials used in connection with a service or activity performed on an installation for the benefit of the DoD.[6]

It is important to note that many of these exceptions require Secretary of the Army approval, but efforts are underway to delegate this approval authority to lower levels of command. This office is assisting in the development of guidance on this issue, and information will be provided as it becomes available.

THE SIKES ACT IMPROVEMENT ACT OF 1997 -
Mr. Scott M. Farley and LTC Richard A. Jaynes

INTRODUCTION

Since 1960, the principles of the Sikes Act[7] have been held dear primarily by hunters and fishers because they served to facilitate access to 25 million acres of land managed by the Department of Defense (DoD).[8] On 18 November 1997, President Clinton signed the Sikes Act Improvement Act (SAIA) into law as Title XXIX to the National Defense Authorization Act for Fiscal Year 1998.[9] In many ways the SAIA simply codifies present DoD and Army practice. In other ways, however, the SAIA fundamentally changes the dynamic by which DoD manages its land and natural resources. Most notably, what was once done according to guidance must now be accomplished according to statutory requirement. The Sikes Act is not just for hunters and fishers anymore: DoD's installation trainers, range managers, natural resource managers, and attorneys should take note.

That Was Then

The Sikes Act, as it existed prior to the SAIA,[10] authorized much but mandated little. The Act primarily focused on empowering DoD and its component services to enter into partnerships with the Department of the Interior (DoI), State fish and wildlife agencies, and even private entities to provide for the sound management of natural resources on military installations. The intended management framework revolved around the authority for installations to enter into "cooperative plans" that were "mutually agreed upon" by the military installation, DoI and the State wildlife agency.[11] Cooperative planning allowed installations to develop sustainable fish and game

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[6] Authorization Act § 343(b)(2).

[7] 16 U.S.C. § 670a-f (1997). The Sikes Act, its roots stemming back to 1949, was first enacted in 1960, authorizing DoD to manage fish and wildlife resources in cooperation with State fish and game agencies, and to retain hunting and fishing fees on installations to help finance conservation programs. Pub. L. No. 86-797, 74 Stat. 1052 (1960). Subsequent amendments substantially expanded the Act to provide authority for cooperative plans with both government and non-governmental entities, and encouraged planning for sustained multiple-use management of a broad range of natural resources.

[8] RAND NATIONAL DEFENSE RESEARCH INSTITUTE, MORE THAN 25 MILLION ACRES? DOD AS A FEDERAL, NATURAL, AND CULTURAL RESOURCE MANAGER, 4 (1996). The Army manages approximately 12.5 million acres, while the Air Force and Navy (including the Marine Corps) manage 9.0 and 3.5 million acres, respectively.

[9] Sikes Act Improvement Act of 1997, Title XXIX, Sec. 2901-2914, National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85 (1997).

[10] The last time the Act was significantly amended was in 1986. Pub. L. No. 99-561, 100 Stat. 3149 (1986).

[11] If an installation chose to develop a "cooperative plan," the Act established minimum content requirements that must be met (e.g., range rehabilitation, and habitat improvement projects). *See* 16 U.S.C. § 670a (1997).

programs by generating revenue for conservation projects,[12] establishing management partnerships, and facilitating enforcement. Formal natural resource planning under the Act, however, remained entirely discretionary.

Although there was no statutory planning mandate in the Sikes Act prior to 1986, Congress amended the Act in 1986[13] to direct each military department to manage the natural resources at its installations to provide for "sustained multiple purpose uses" and public access "necessary or appropriate for those uses."[14] Where natural resource management goals conflicted with the military mission, Congress made clear that the mission must prevail.[15] Rather than legislate how this mandate should be carried out, Congress committed this judgment to the discretion of each military department, effectively precluding judicial review of DoD natural resource planning and management.

To more uniformly manage its natural resources, and despite the lack of a statutory mandate, DoD adopted a policy in 1996 that required formal integrated natural resource management plans (INRMPs).[16] The Army further implemented that policy in early 1997 by establishing guidance and a timeframe for completing installation INRMPs.[17]

THIS IS NOW

The SAIA continues the baseline requirement for DoD to manage installation natural resources on a sustained multiple-use basis, and adopts DoD's self-imposed INRMP requirement as a Congressional directive.[18] Most DoD installations are required, by 18 November 2001, to prepare and begin implementing INRMPs.[19] Congress included in its INRMP policy that each INRMP must reflect the "mutual agreement" of the U.S. Fish and Wildlife Service (FWS) and State fish and wildlife agency with regard to certain aspects of the plan,[20] address specified areas,[21] and solicit public comments.[22] In short, natural resource planning and management must now occur through

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[12] The Sikes Act's most important financial provisions allow DoD to retain funds collected from the operation of any cooperative plans and agreements and restrict their spending to the purposes of those plans and agreements. *Id.* § 670d.

[13] The Act did contain other minor mandates such as the requirement to use, "to the extent feasible," professionally trained DoD personnel for fish and wildlife management and enforcement. *See id.* § 670a-1(b).

[14] *Id.* § 670a-1(a).

[15] *Id.* Management for multipurpose uses and public access was required, but only "to the extent that those uses and that access are not inconsistent with the military mission of the reservation."

[16] Department of Defense Instruction No. 4715.3, Environmental Conservation Program (May 3, 1996).

[17] *See* Memorandum from Major General Randolph W. House, Army Assistant Chief of Staff for Installation Management to Army Major Commands, Subject: Army Goals and Implementing Guidance for Natural Resources Planning Level Surveys (PLS) and Integrated Natural Resources Management Plans (INRMP) 13 (Mar. 21, 1997) (on file with authors). *See also* Thomas Ayres, *Integrated Natural Resources Management Plan (INRMP) Guidance Released,* ARMY LAW. Jun., at 57, DA-PAM 27-50-295 (1997). This article provides legal advice for meeting NEPA aspects of INRMPs.

[18] Sikes Act Improvement Act of 1997, Title XXIX, Sec. 2901-2914, National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85 (1997). This also imposes substantial reporting requirements. DoD must report to Congress by 18 November 1998, describing all installations for which INRMPs will be prepared, and must explain its reasons for excluding installations from the INRMP requirement. Thereafter, DoD must report annually as to the status of INRMP preparation and implementation for those installations for which the INRMP requirement applies.

[19] *Id.* Sec. 2905(c). Reporting requirements apply to installations with sufficient resources to warrant INRMPs.

[20] *Id.* Sec. 2904(a). These provisions tend to favor fish and wildlife interests over other natural resource interests such as outdoor recreation, livestock grazing, and timber harvesting.

[21] *Id.* Sec. 2904(c).

[22] *Id.* Sec. 2905(d).

a

statutorily mandated process that establishes time lines, prescribes necessary elements, and requires open and coordinated preparation.

Equally important to military commanders, the SAIA contains language clarifying the intent of Congress to ensure military installations remain focused upon the conduct of military training and operations. Three statements particularly signal the Congressional intent to protect the primary purpose for military installations. First, Congress recognized and unequivocally declared that military departments have the use of "installations to ensure the preparedness of the Armed Forces."[23] Second, Congress mandated that every INRMP must be "consistent with" that primary use for installation lands.[24] Third, Congress required that each INRMP to ensure that there is "no net loss in the capability of military installation lands to support the military mission of the installation."[25] The Conference Report addressing the SAIA further establishes that the clear Congressional intent of the Sikes Act reauthorization effort was to give military installation commanders a better tool to conduct military operations and training activities while conserving natural resources.[26]

PRACTICE NOTES

Several important implementation issues warrant careful attention by installation environmental law specialists (ELS):

The Scope of FWS and State Involvement. For two years the Sikes Act reauthorization effort foundered because DoD would not accede to FWS and State control over portions of the INRMPs not addressing fish and wildlife.[27] Congress made clear in the SAIA that only those portions of the INRMP that concern "conservation, protection, and management of fish and wildlife resources" are subject to the "mutual agreement" of the FWS and State fish and game

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[23] *Id.* Sec. 2904(a). It should also be noted that significantly Congress did not choose to use the words "necessary for reasons of national security" when dictating the level of consideration for military activities as it has done with many other environmental statutes. *See, e.g.*, Endangered Species Act of 1973, 16 U.S.C. § 1536(j) (1997). While the term "national security" denotes a high standard that can only be invoked when overall military readiness is threatened, the use of the term "military preparedness" denotes a much lower standard that ensures INRMPs do not interfere with military operations and training activities that contribute to military or unit readiness. The SAIA emphasis on "preparedness" strengthens the "purpose" statement that had been in the Sikes Act previously. *See supra* note 9 (prior statutory text).

[24] Pub. L. No. 105-85, Sec. 2904(c) (1997).

[25] *Id.*

[26] H.R. CONF. REP. NO. 105-340, at H9435 (1997), states in part:

"The conferees note that the reauthorization of the Sikes Act would directly affect the nearly 25 million acres managed by the Department of Defense. The conferees agree that reauthorization of the Sikes Act is not intended to expand the management authority of the U.S. Fish and Wildlife Service or the State fish and wildlife agencies in relation to military lands. Moreover, it is expected that integrated natural resources management plans shall be prepared to facilitate installation commanders' conservation and rehabilitation efforts that support the use of military lands for readiness and training of the armed forces.

The conferees note that the military departments will have completed approximately 60 percent of the required integrated natural resources management plans by October 1, 1997. The conferees understand that most of these plans have been prepared consistent with the criteria established under this provision. In addition, the conferees note the significant investment made by the military departments in the completion of current integrated natural resources management plans. The conferees intend that **the plans that meet the criteria established under this provision should not be subject to renegotiation and reaccomplishment**." [Emphasis added.]

[27] *Sikes Act Agreement in Jeopardy after Military Services' Objections,* DEFENSE ENVIRONMENTAL ALERT, June 12, 1996, at 3.

agencies.[28] While the FWS and States are significant stakeholders entitled to close coordination in INRMP development, the Act clearly states that nothing in the Act "enlarges or diminishes the responsibility and authority of any State for the protection and management of fish and resident wildlife."[29] If the INRMP is to be used as a valuable tool by military installations, it must address military training and land use planning areas beyond fish and wildlife. When an INRMP does so, the language of the SAIA clarifies that Congress agreed with DoD and excluded the need for DoD to reach mutual agreement with FWS and the State on issues beyond their expertise.

Existing INRMPs. The conference committee report indicates it intended to "grandfather" existing "cooperative plans" that could be modified to meet the new legislation.[30] Nevertheless, the SAIA directs installations with existing cooperative plans to "complete negotiations with the [FWS] and [State] regarding changes in the plan" necessary for the plan to meet the requirements for an INRMP. [31] While the term "negotiation" is left undefined, installations with existing INRMPs may want to point out during those negotiations the Congressional intent to grandfather existing INRMPs.

Prepare Record for Possible Litigation. The SAIA's elevation of the INRMP to mandatory agency action has significant administrative law consequences. Preparation of an INRMP may be subject to the judicial review provisions of the Administrative Procedure Act (APA). [32] This empowers the Federal judiciary, at the request of an aggrieved party, to set aside agency action that is taken without adherence to all procedures required by law. Thus it is possible for a State fish and wildlife agency to seek judicial review of an INRMP in which the State did not concur. It is also a possibility that potential litigants could challenge natural resource management activities designed to enhance military training (e.g., prescribed burning) but which are not part of an INRMP.

Ensure INRMPs Are Coordinated with Other Planning Statutes. The legal procedures associated with development of an INRMP will transcend those set forth in the SAIA. In particular, installations should consider necessary levels of supporting National Environmental Policy Act (NEPA)[33] documentation, Section 7 of the Endangered Species Act (ESA)[34] consultation, and Section 106 of the National Historic Preservation Act (NHPA)[35] consultation. The INRMP development process must be tailored to coordinate and integrate these processes.[36] But most importantly, installations must document the decision making process in a detailed, thorough administrative record.[37] This process would also prove helpful for Army

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[28] Pub. L. No. 105-85, Sec. 2904(a) (1997).

[29] *Id.*

[30] *See supra* note 20.

[31] *Id.* Sec. 2905(c).

[32] 5 U.S.C. §§ 701-706 (1997). The APA provides that "a person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." *Id.* § 702.

Besides describing this private right of action, § 704 describes actions judicially reviewable, and § 706 articulates the scope of review to include actions that are: "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

[33] National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d (1997).

[34] Endangered Species Act, 16 U.S.C. § 1536(a)(2) (1997). See also implementing regulations: Interagency Cooperation - Endangered Species Act of 1973, as amended, 50 C.F.R. Part 402 (1997).

[35] National Historic Preservation Act, 16 U.S.C. § 470f (1997).

[36] The ELS should also give close consideration to how an INRMP addresses impacts from testing, training, and other mission related activities. Challenge to an INRMP could provide a forum for indirectly attacking such activities.

[37] The Army INRMP Implementing Guidance (*see supra* note 11) states that all installation INRMPs must undergo NEPA analysis in accordance with Army Regulation 200-2, Environmental Effects of Army Actions (1988). In

Secretariat review and override of a nonconcurrence by the FWS or State fish and game agency to an INRMP.

Develop Compliance Strategy. The Army's existing natural resource management policy and guidance will need much amendment to implement many provisions of the SAIA. In the meantime, the ELS can serve an important function by reviewing the state of the existing natural resource program on post,[38] establishing communications with the FWS and relevant State agencies, and working closely with the installation natural resource professionals to establish a compliance strategy. The compliance strategy should project time lines, funding, and procurement mechanisms necessary to ensure completion of planning level surveys, integration of all legal processes (SAIA, NEPA, ESA, and NHPA), and coordination with all major stakeholders prior to the 18 November 2001 deadline.

Develop a Baseline for Non-Mission Use of Lands. Each installation's natural resource managers and range and training officers should coordinate and document existing non-mission uses of installation land and natural resources. This is an essential task that should be completed either as part of the INRMP process, or as a separate activity. This effort may ultimately be used to give effect to the assurances in the SAIA that lands are to be used to ensure the preparedness of military units, and that there must be no net loss in the use of those lands for intended purposes, namely military operations and training. At the same time, the installation should develop a baseline of documented military use and the need for training flexibility on the installation's range and training lands. This will entail doing more than just cataloging numbers of training days that ranges were used. It should include such details as the necessity and use of weapons safety buffer zones, requirements for flexibility (to accommodate preparations for deployments, visiting units, reserve units or expanding missions), and the requirement to "rest and rotate" training areas for both natural resource renewal and to keep soldiers from knowing terrain too well.

EPA's New Guidance on the Use of RCRA's Imminent Endangerment Authority - Major Lisa Anderson-Lloyd

On 20 October 1997, EPA sent its regional offices new enforcement guidance on using Resource Conservation and Recovery Act's (RCRA) Section 7003,[39] the imminent and substantial

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most cases, because INRMPs are derived to maintain and sustain natural resources, production of an environmental assessment (EA) accompanied by a Finding of No Significant Impact (FONSI) should satisfy the requirements of AR 200-2 and NEPA. If, however, implementation of the INRMP will significantly impact the environment, then the installation must produce an Environmental Impact Statement (EIS). When complying with AR 200-2, the installation must publish the FONSI and the proposed INRMP for public comment prior to actual implementation. The proposed action identified in the NEPA document will normally be implementation of the INRMP. The NEPA document should also include analysis of a range of reasonable alternatives, to include, at a minimum, analysis of the no-action alternative. Analysis of the no-action alternative often serves as a baseline for determining environmental effects. If implementation of the INRMP is potentially controversial, the NEPA document should contain detailed analysis of at least one additional alternative, for example, implementation of an alternative plan to the INRMP (e.g., perhaps one of the draft INRMPs or a management plan suggested by an interested group or agency).

[38] Review should initially be focused on existing cooperative plans, Endangered Species Management Plans, ESA Biological Assessments and Opinions, and NEPA documents addressing impacts to natural resources. Many installations have also prepared draft INRMPs in anticipation of SAIA enactment. These should be reviewed for consistency with the new mandates.

[39] 42 U.S.C. § 6973 (West 1997).

endangerment authority.[40] The guidance emphasizes the power of Section 7003 as a broad enforcement tool that can be used to address circumstances that may present an imminent and substantial endangerment to health or the environment. This document takes the place of previous guidance issued in 1984 that dealt exclusively with how to issue administrative orders pursuant to Section 7003. The new guidance also discusses procedures for taking judicial action and updates policy in line with new case law and revised enforcement priorities. EPA provides an explanation of imminent substantial endangerment, case-screening factors, the relationship of Section 7003 to other authorities, and the legal requirements for initiating action under Section 7003.

EPA cites the many benefits of Section 7003, chiefly the effectiveness in furthering risk-based enforcement and addressing the worst RCRA sites first. The guidance also points out the availability of Section 7003 as an enforcement tool for sites and facilities that are not subject to RCRA or other environmental regulation. In addition, Section 7003 can also be used to address endangerment at facilities that are in compliance with a RCRA permit. In this instance, however, the guidance directs the regions to consider requiring necessary actions under the permit authorities rather than Section 7003. Another benefit noted by the document is that administrative remedies do not have to be exhausted before using the imminent and substantial endangerment authority.

In deciding whether to take action under Section 7003, the regions were urged to give the highest priority to sites that pose serious risks to health or the environment. In addition, the guidance cautions that special consideration should be given to sites that pose environmental justice concerns. Another screening factor regions are directed to consider is the technical difficulty of performing the necessary activities and the likelihood that the responsible party will be capable of the required performance.

EPA cited case law in which courts have interpreted Section 7003 authority broadly in describing what constitutes an “imminent and substantial endangerment.” EPA emphasized that the endangerment “may” occur in the future, and that there need not be proof of harm only a risk of potential harm. The guidance states that for the “substantial” component to be satisfied, the risk does not have to be quantified, as long as there is a reasonable cause for concern about potential harm.

The guidance gives the circumstances under which the use of RCRA Section 7003 is preferred over the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) authority.[41] Regions are advised to consider using RCRA if the materials posing the risk of harm meet RCRA’s statutory definition of hazardous waste but do not qualify as hazardous substances under CERCLA. Section 7003 may also be advantageous to address potential endangerment caused by petroleum because petroleum is not a hazardous substance under CERCLA. In addition, RCRA Section 7003 authority is preferred in the circumstance when a region is seeking an administrative order requiring long-term cleanup. Under CERCLA [42]remedial action must be in the form of a judicial consent decree.

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[40] Guidance on the Use of Section 7003 of RCRA, issued by EPA Assistant Administrator for Enforcement Steven Herman, October 20, 1997.

[41] 42 U.S.C. §§9601-75 (West 1997).

[42] Id. §9622(d)(1)(A).

It will be of interest whether the new guidance will result in an increase in Section 7003 enforcement actions or just a heightened awareness of the breadth of the authority. EPA has proposed the most expansive reading of the Section 7003 enforcement authority using the language of the statute and recent case law.

Fines and Penalties Update - MAJ Silas DeRoma

At the close of the first quarter of FY 1998, four new fines had been assessed against Army installations. Of the 160 fines assessed against Army installations since FY 1993, the majority are RCRA fines (89), followed by the Clean Air Act (40), the Clean Water Act (22), the Safe Drinking Water Act (6), and, finally, the Comprehensive Environmental Response and Compensation and Liability Act (3).

Of particular note in the latest reporting quarter was the first fine assessed against an Army installation under the amended Safe Drinking Water Act. The fine was based on allegations by EPA, Region IV, that an Army installation failed to collect samples of coliform bacteria, exceeded maximum contaminant levels (MCL) for coliform bacteria, failed to properly maintain a disinfectant residual throughout the drinking water distribution system, failed to implement an adequate main flushing system, failed to operate and maintain properly storage tanks and reservoirs, and failed to provide timely public notice of MCL violations. EPA, Region IV, has proposed a $600,000 fine due to the allegations, and negotiations are underway.

Environmental practitioners will recall that the Safe Drinking Water Amendments of 1996, effective 6 August 1996, significantly expanded Federal liability to include injunctive relief, civil and administrative fines and penalties, administrative orders, and reasonable service charges assessed in connection with permits, plans, inspections or monitoring of drinking water facilities, as well as any other nondiscriminatory charges respecting the protection of wellhead areas or public water systems or underground injection. Under the amendments, EPA may issue penalties against Federal agencies that can range as high as $25,000 per day per violation. Installation Environmental Law Specialists (ELSs) are reminded that payment of fines and penalties by Army installations is governed by, ***inter alia***, the Supreme Court decision of ***Dep't of Energy v. Ohio***, 503 U.S. 607 (1992). Additionally, by regulation, the Environmental Law Division "review[s] all draft environmental orders, consent agreements, and settlements with Federal, state, or local regulatory officials ***before*** signature." Dep't of Army, Reg. 200-1, Environmental Protection and Enhancement, para. 17d (21 Feb. 1997) (emphasis added).

DEPARTMENT OF THE ARMY
HEADQUARTERS, U.S. ARMY MATERIEL COMMAND
5001 EISENHOWER AVENUE, ALEXANDRIA, VA 22333 - 0001

REPLY TO
ATTENTION OF

AMCCC (600-50a) 8 January 1998

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Ethics

1. Ethics is the backbone of the U.S. Army Materiel Command's mission and vision. Ethics is that core value by which we establish respect, confidence, and trust among ourselves, with our contractors, and with the American taxpayer.

2. Congress has passed laws so that the public can be confident that all Government employees will adhere to certain standards of conduct. The President has charged the Office of Government Ethics to provide the necessary regulatory guidance for these laws and related matters. We are expected to know what these laws and regulations require of us, and to comply. However, the social and business interactions that we engage in among ourselves and with others can create complicated situations where we might not be sure what to do. To help us, there are Ethics Counselors in legal offices throughout the command responsible for our ethics training, advice and counsel.

3. I expect each of you to have a basic understanding of the rules, and to take them seriously. I expect you to attend any required training and to pay attention to the ethics information that is published by your ethics officials. If you are required to file a financial disclosure report, I expect you to do so forthrightly and timely (within 30 days of your appointment to the position that requires such filing, and during the annual filing seasons). Most importantly, I expect you to be sensitive to issues created by gifts (among ourselves or from outside sources), our personal and official relationships with private organizations, stock ownership, seeking employment, and outside activities such as off-duty employment, speaking, teaching and writing. When you come across any of these issues, seek the advice and counsel of your ethics official ***before*** you act.

4. We exist to support the soldier. Ethics is the linchpin by which we are able ultimately to accomplish this mission.

5. AMC -- America's Arsenal for the Brave.

JOHNNIE E. WILSON
General, USA
Commanding

DISTRIBUTION: H, B

What if an outside source, such as a contractor or professional association, offers to pay some or all of your official travel expenses (including free attendance) to some event? Can you accept them?

Perhaps. There is a statute (31 U.S.C. Sec. 1353) that authorizes the acceptance of such gifts. But, there are rules, conditions and restrictions:

Never solicit!

If an outside source offers to pay some or all of your official travel and related expenses, you may not accept unless all of the following exist:

1. You must be in an "official" travel status.

2. Your travel must be to a meeting or similar event (as opposed to mission accomplishment), such as a seminar, symposium, or training course.

3. Your travel approving authority must approve in writing your acceptance of the gift on behalf of the Army after doing a conflict of interest analysis (i.e., based on all the facts of the situation, the approving authority must be able to conclude that acceptance of the gift would not lead a reasonable person to question the integrity of Army programs or operations).

4. Your Ethics Counselor concurs in the approval.

If approved:

1. Payment in kind is preferred.
2. Never accept cash!
3. If reimbursement is by check, have it made payable to Department of the Army.
4. If value of gifts exceeds $250, you must submit a report to your Ethics Counselor. It will be forwarded to the Office of Government Ethics where it will be made available for public inspection.

Attached is a Memorandum for Travelling HQ USAMC Employees that explains the above rules and includes a format for the travel approving authority's written approval. Note that there is a coordination line for the HQ,

USAMC Ethics Counselor. The format for the required report will be provided at the time that we coordinate on the approval document.

If you have any questions, please feel free to contact me or Alex Bailey (617-8004) at any time.

Mike Wentink, Room 7E18, 617-8003
Associate Counsel (Ethics)

AMCCC-G (600-50a) 26 June 1997

MEMORANDUM FOR TRAVELLING HQ USAMC EMPLOYEES

SUBJECT: Gifts of Travel and Related Expenses Accepted Under 31 U.S.C. § 1353

1. This memorandum contains general guidance relating to gifts of travel and related expenses offered (unsolicited) to you by a non-Federal source to defray some or all of the costs of your **official** travel and attendance at a conference, seminar, symposium, or other meeting. Formal detailed guidance on this subject, including all the pertinent references, may be found in HQDA LTR 55-96-1 dated 30 October 1996, subject: Acceptance of Payment from a Non-Federal Source for Official Travel Expenses.

2. Before you may accept such offers on behalf of the Army, you must have prior approval from your travel approving authority and the concurrence of your Ethics Counselor. The approving authority must do a "conflict of interest analysis" to determine that acceptance under the circumstances would not cause a reasonable person with knowledge of all the relevant facts to question the integrity of Army programs or operations. This "conflict of interest analysis" and determination must consider such matters as:

the identity of the source;
the nature and purpose of the meeting or similar event;
the identity of the other participants;
the nature and sensitivity of matters pending in the Army affecting the interests of the source;
the significance of the Army traveller's role in such matters; and
the value and character of the travel benefits.

3. In most cases, the travel approving authority will be your supervisor. Some Army employees approve their own travel. In either case, the determination and approval must be in writing and submitted to your Ethics Counselor for concurrence. Enclosed is a format the travel approving authority may use to accomplish and record his or her analysis, determination and approval.

4. Travel benefits may only be provided in-kind or by a check payable to the Department of the Army. You may **never** accept cash payments. If the value of the

travel benefits accepted from a non-Federal source exceed $250, you must submit a report, with a certification to your Ethics Counselor. Ultimately, these reports are forwarded to the Office of Government Ethics for public inspection. Enclosed is a format that you may use for this report.

5. Do not use this authority or approval process for gifts of personal travel (*i.e.*, travel while on leave, permissive TDY or other administrative absence). In such cases, consult with your Ethics Counsel to ensure that you may accept such travel reimbursement in your personal and private capacity and what report might be required.

6. The Ethics Counselor for Headquarters, U.S. Army Materiel Command, is in the Office of the Command Counsel, General Law Division, Room 7E18. The telephone number is 617-8003.

Enclosures
(as stated)

MICHAEL J. WENTINK
Associate Counsel/Ethics Counselor

Office Symbol

MEMORANDUM FOR RECORD

SUBJECT: Approval of the Acceptance of Travel Benefits Under 31 U.S.C. § 1353

1. Travel benefits have been offered by [identify the non-Federal source(s)] to accommodate the participation of]identify Army employee by name, rank and position] in [identify the title and nature of the meeting or similar event] on [date of meeting or similar event] in [place where meeting or similar event is held] . The Army employee will be travelling, attending and participating in an official capacity and [the non-Federal source] has offered to pay for the following travel and related expenses which will be provided either in kind or by check payable to the Department of the Army:

(Identify what has been offered, such as:)

_____ Round-trip air transportation
_____ Other transportation (describe)
_____ Overnight accommodations
_____ Meals
_____ Free attendance at event
_____ Other (describe)

2. I have done a conflict of interest analysis taking into account such factors as the source of the gift, to whom it is offered, any matters that I know of before the Army concerning the source, and the nature of the employee's involvement, if any, in the matter. I hereby determine that acceptance of these travel benefits would not cause a reasonable person with knowledge of all the relevant facts to question the integrity of the Army's programs or operations and **approve** [employee's name] accepting the above-described gift on behalf of the Army.

3. This approval has been coordinated with the Headquarters, U.S. Army Materiel Command Ethics Counselor.

<signed>
Travel Approving Authority

Coordination: HQ, USAMC Ethics Counselor

Concur _____
Nonconcur _____

Note: a copy of this approval should be maintained by the traveller and his or her Ethics Counselor.